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Supreme Court, U.S.
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No. 91-____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1991

Wayne Estelle, Warden, ***Petitioner,***

v.

Gary Stewart Boardman, ***Respondent.***

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a lower federal court may refuse to enforce the doctrine of *Teague v. Lane* and its progeny, precluding *habeas corpus* relief premised upon the retroactive application of a "new rule" of law not in existence at the time of the finality of the state criminal proceedings, because the State did not raise the issue of the *Teague* bar until its petition for re-hearing, immediately upon the federal court's announcement of the rule that the State contends to be "new."

2. If so, whether a non-capital sentencing hearing becomes fundamentally unfair under the Due Process Clause of the Fourteenth Amendment when a state court refuses to permit a criminal defendant, already represented by counsel, to address the court personally in "allocution."

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OPINION BELOW

The published original and supplemental opinions of the Court of Appeals for the Ninth Circuit are reported at 937 F.2d 1523. They are reprinted in Appendix A to this Petition.

JURISDICTION

The original opinion below was filed on January 9, 1992. The supplemental opinion, denying rehearing, was filed on March 11, 1992. The Ninth Circuit has stayed issuance of the mandate until June 12 to allow for the filing of this Petition for Writ of Certiorari.

Respondent Boardman first invoked federal court jurisdiction in this *habeas corpus* case under 28 U.S.C. § 2254. Petitioner Estelle [the State] now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall . . . deprive any person of life, liberty, or property without due process of law . . . ."

STATEMENT OF THE CASE

In 1983, the State of California charged respondent Gary Stewart Boardman with twenty-nine counts of lewd conduct, oral copulation, and sodomy committed against seven different child victims under the age of fourteen years. Boardman pleaded "guilty" to eleven of the counts: four counts of oral copulation with a child under fourteen and seven counts of lewd conduct with a child under fourteen. He also admitted certain "special" allegations that rendered him ineligible for probation on nine of those counts. Boardman and his defense counsel further agreed that, in sentencing on the eleven counts, the judge could consider the facts and circumstances underlying the remaining eighteen counts, even though they were to be dismissed as part of the plea agreement.

At the sentencing hearing, the superior court judge considered the probation officer's report, a lengthy statement in mitigation filed on Boardman's behalf, and approximately 137 pages of accompanying exhibits that included psychiatric and psychological reports and recommendations for treatment, information concerning patterns of sentencing for sex offenses in other jurisdictions, and numerous letters of reference and

support from Boardman's friends, associates, and family members. The judge also heard testimony and informal statements from several persons, including Boardman's mother, his sister, and two clinical psychologists.

Boardman's defense attorney urged the judge to impose a short term of imprisonment on some counts and a subsequent long period of probation on other counts, conditioned upon Boardman's participation in a mandatory program of pharmacological therapy described in his exhibits and by his expert witnesses. The mother of one of the child victims also made a statement urging the judge to allow Boardman to participate in the proposed treatment program as a condition of probation.

During the sentencing hearing, defense counsel advised the judge that "the defendant would like to address the court before [counsel] concludes." The judge replied, "I'd just as soon not, if you don't mind. [¶] Any remarks should come from you." Directing defense counsel to proceed with his sentencing arguments, the judge further commented, "Just in general, I find it's better not to have the defendants make comments. . . . And this is from experience, believe me."

The judge rejected the defense's proposal for a mixed prison and probation scheme. He stated that, although the defense's proposal was "attractive" and impressive in certain respects, probation nevertheless was not appropriate, for Boardman had a "deep" and "almost incurable problem" that required constant supervision to protect against the serious threat he posed to young and vulnerable children.

The judge sentenced Boardman to prison for an aggregate term of twenty-four years on nine of the eleven counts. In doing so, the judge found that Boardman had taken advantage of a position of trust,

that he had been breaking the law for years by illegally using drugs, that his crimes each involved separate incidents, and that they had been planned and premeditated. These aggravating factors, the court determined, outweighed the mitigating factors of Boardman's lack of prior contacts with the courts and the fact that he had not previously been a "drain on society." The judge "stayed" punishment on the other two counts because they involved the victim whose mother had asked the court to grant Boardman probation. Thereafter, pursuant to a further provision of the negotiated plea agreement, the criminal complaint was amended to add thirteen more counts alleging similar offenses elsewhere in California and Hawaii, and those counts then were immediately dismissed "in furtherance of justice."

In August, 1985, the California Court of Appeal upheld Boardman's sentence against his claim that he had been denied "due process" when he was barred from personally addressing the superior court judge prior to sentencing. The state appellate court determined that the denial of Boardman's request to personally address the sentencing judge was inconsequential in light of the judge's favorable consideration of the lengthy statement in mitigation and defense exhibits, the testimony and statements of the numerous defense witnesses, and counsel's comprehensive comments in support of a grant of probation. In September, 1988, the California Supreme Court denied respondent's petition for writ of *habeas corpus* without comment.

In August, 1989, Boardman filed a *pro se* petition for writ of *habeas corpus* in the United States District Court for the Central District of California. In that petition, Boardman alleged that he "was denied due process of

law when his express request to personally address the Trial Court prior to imposition of sentence was affirmatively denied." The federal magistrate judge concluded that a criminal defendant represented by counsel does not have a constitutional right to speak personally in mitigation of his sentence and further concluded that, in any event, the state court's refusal to let Boardman speak had not prejudiced him. The district court judge adopted the magistrate judge's conclusions and denied *habeas corpus* relief.

In his request for a certificate of probable cause, Boardman asserted that the state sentencing court "in closed chambers" had considered damaging leters from "victims family members" [*sic*], and that he was "deprived of the opportunity to have his voice heard, either in answer to any accusations or to personally plead for leniency." In denying the certificate, the district court judge refused to consider this claim because it had not been raised in either the petition or the traverse.

The Ninth Circuit Court of Appeals reversed in a 2-to-1 decision. The majority opinion, written by Judge Trott, concluded "that allocution is a right guaranteed by the due process clause of the Constitution" in circumstances in which "a defendant, either unrepresented or represented by counsel, makes a request to speak to the trial court before sentencing." Finding the record inadequate on the question of prejudice, however, the panel remanded the case to the district court for a determination of whether the denial of Boardman's right of allocution was harmless. In dissent, Judge Hall concluded: that the majority opinion had incorrectly transformed a "common law right of allocution" into a "federal constitutional mandate"; that "the majority's holding is at odds with the wide discretion

enjoyed by sentencing judges and the accordingly narrow due process rights of defendants at sentencing"; and that the majority had "cavalierly and unwisely place[d] its stamp of approval upon 'hybrid representation' of a criminal defendant by affording Boardman all the advantages of proceeding *pro se* and through counsel."

The State petitioned for re-hearing and suggested re-hearing *en banc*. The State argued that, in granting *habeas corpus* relief, the majority opinion had improperly invoked a new rule of constitutional law, in derogation of the *Teague v. Lane* rule. In a published supplemental opinion, the panel (1) concluded that it had discretion to either consider or reject the State's *Teague* argument because the State had not presented it earlier either in the district court or in its appellate brief, but (2) refused to consider the claim, finding that "[c]oncerns of federalism and respect for a state's criminal judgments are marginal here because the state brought the problem on itself." The panel thus denied rehearing. The State's suggestion for *en banc* hearing also was denied.

REASONS THE WRIT SHOULD ISSUE

1. The question of whether a State may be deemed to have waived the *Teague* proscription against retroactive application of new rules of law in 28 U.S.C § 2254 cases is an important question of federalism and comity that has been resolved in conflicting ways in the various circuit courts of appeals.

In the last few Terms, this Court has embarked upon a reconsideration of federal *habeas corpus* case law that in many important ways has restored the writ to its proper historical role in our system of federalism. One of the most incisive reforms in this Court's efforts was the rule of *Teague v. Lane,* 489 U.S. 288 (1989). Under *Teague* and its progeny, a federal court generally may not grant *habeas corpus* relief to a state prisoner by retroactively enforcing any "new rule" of constitutional law not clearly in existence at the time of the finality of the state criminal proceedings. Accord: *Sawyer v. Smith,* 497 U.S. 227 (1990); *Saffle v. Parks,* 494 U.S. 484 (1990); *Penry v. Lynaugh,* 492 U.S. 302 (1989); *Butler v. McKellar,* 494 U.S. 407 (1990).

The *Teague* proscription against the retroactive invocation of "new rules" as predicates for federal *habeas corpus* relief vindicates the finality and comity interests that help shape the proper scope of *habeas corpus* review. *Teague, supra,* 489 U.S., at 308. Because the "foremost" purpose of *habeas corpus* review is to insure that the state courts conduct trials in accord with the Constitution "as interpreted at the time of the proceedings," *Saffle, supra,* 494 U.S., at 488, "[t]he 'new rule' principle . . . validates reasonable, good-faith

interpretations of existing precedents made by state courts . . . ." *Butler, supra,* 494 U.S., at 414.

When a federal court grants a writ of *habeas corpus* to a state prisoner without regard to whether the relief is founded upon the retroactive application of a "new rule" that did not authoritatively bind the state court at the time of the criminal proceedings, then, the federal intervention is inconsistent with the very purposes underlying the *habeas corpus* remedy itself. The question of when, if ever, a federal court may grant *habeas* relief without regard to the retroactivity proscription is therefore an important one that commands the attention of this Court.

This Court's own actions have signalled the importance of the issue. For example, this Court undertook to decide the "new rule" question in *Teague* itself, despite the fact that the issue had not been raised by the parties in the lower courts and was raised in the Supreme Court only in an *amicus curiae* brief. 489 U.S., at 300. Similarly, in *Saffle, supra,* and in *Zant v. Moore,* 489 U.S. 836 (1989)(per curiam), this Court also reached the *Teague* retroactivity question *sua sponte.*

The Court's words reinforce those actions. For example, the *Teague* opinion characterized resolution of the "new rule" issue as a "threshold question." *Teague, supra,* 489 U.S., at 300. In addition, in considering whether a state might *expressly* waive a *Teague* defense, this Court in *Collins v. Youngblood,* 497 U.S. 37 (1990), invoked by analogy the similar rule recognizing only explicit waivers of a state's Eleventh Amendment immunity defenses.

The law governing a state's waiver of a claim of abstention under the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971), is also instructive in assessing whether a

state may be held to have implicitly or unintentionally waived a *Teague* claim. The seminal *Teague* opinion cited the *Younger* doctrine's bar against federal injunctions restraining state criminal proceedings, and relied upon similar underlying demands of federalism and comity in justifying the "new rule" proscription on *habeas corpus* relief; indeed, *Teague* suggested that federal *habeas corpus* relief was even more intrusive upon legitimate state interests than such injunctions. 489 U.S. at 308-310. But, as the Ninth Circuit itself discerned in this case, "[a] state may waive *Younger* only by express statement, not through failure to raise the issue." See *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 480 (1977). Waivers of *Teague* claims also should be recognized only if they are explicit.

It has become of added importance for this Court to resolve this question, because various federal appellate circuits have reached conflicting decisions on it. The Courts of Appeals for the Fifth, Seventh, and Tenth Circuits have refused to infer a State's waiver of the *Teague* proscription from the custodian defendant's failure to raise it expressly prior to the appellate court's decision. E.g., *Smith v. Black,* 904 F.2d 950, 981 n. 12 (5th Cir. 1990), *vacated* ___ U.S. ___, 117 L.Ed.2d (1992); *Hanrahan v. Thieret,* 933 F.2d 1328, 1337 n. 19 (7th Cir. 1991), *cert. denied* 116 L.Ed.2d 464 (1991); *Hopkinson v. Shillinger,* 888 F.2d 1286, 1288 (10th Cir. 1989)(en banc), *cert. denied* 116 L.Ed.2d 765 (1990). In contrast, the Sixth and Eleventh Circuits have indicated that the State might be deemed to have implicitly waived the *Teague* proscription. *Kordenbrock v. Scroggy,* 919 F.2d 1091, 1104 n.6 (6th Cir. 1990)(en banc) *cert. denied* 113 L.Ed.2d 669 (1991); *Card v. Dugger,* 911 F.2d 1494, 1523, n. 30 (11th Cir. 1990).

Of course, as evidenced in this case, the Ninth Circuit considers the resolution of the question to lie in the federal court's anomalous "discretion" to somehow deem the very interests of federalism and finality "marginal" in a federal *habeas corpus* case brought by a state prisoner. The Ninth Circuit's endorsement of such "discretion" to refuse to enforce a *Teague* claim relies upon a specious analogy to *Granberry v. Greer,* 481 U.S. 129 (1987). *Granberry* held that a federal court may choose either to consider or bar a state's belated claim, raised for the first time on appeal, that a *habeas* petitioner has not first "exhausted" his claims in state court. *Granberry,* however, dealt with the question of the timing of federal collateral review, either before or after exhaustion; it did not deal with the most serious damage to federalism and comity interests wrought by actually disposing of a petition on its merits by granting *habeas corpus* relief premised upon a rule of law not in existence at the time of the state proceedings.

Granberry is inapposite for other basic reasons. As this Court emphasized in *Granberry,* the State's delay in addressing the exhaustion issue will either require useless continued litigation in state court on an unmeritorious petition or will unfairly prolong the confinement of a prisoner whose petition has been adjudged meritorious. Neither untoward result is threatened in the *Teague* context. In unmeritorious petitions, refusing to endorse a rule of implied waiver of *Teague* claims would not require more state court litigation. Indeed, it is improbable that it would require any further litigation at all, useless or not, because the State would have little incentive to raise *Teague* as an additional defense to a petition already adjudged to be meritless. On the other hand, no petition can properly be deemed meritorious at

all without taking *Teague* into account, because the "new rule" proscription performs the central *habeas* role of vindicating the good faith attempts of the state courts to enforce clear constitutional dictates as they existed at the time of the state proceedings.

Besides, unlike the pure legal question of whether a rule of federal constitutional law is "new," the exhaustion question addressed in *Granberry* necessarily depends upon a factual inquiry into the course of the *habeas* petitioner's conduct in litigating his claims in state court. A federal court can be expected to notice the "new rule" legal question on its own; but it generally must rely upon the state to bring to its attention the facts that show lack of exhaustion. For example, the Ninth Circuit's opinion on the allocution issue in this case shows that the panel court understood it was promulgating a new rule of law, for it specifically noted that the allocution answer had been left unanswered by the Supreme Court, that the question had merely been "obliquely touched on" or "grazed" in the Circuit, that it was otherwise "a lingering question that we must decide today," and that other federal circuits had reached differing resolutions of it.[1/]

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1. *Teague* prohibits collateral relief premised upon retroactive application of decisions that did not absolutely "compel" or "dictate" the result sought by the petitioner. A rule is not "compelled" or "dictated," for purposes of this inquiry, if it was merely "informed" by precedent or even if it was "controlled" or "governed" by precedent. Instead, a rule is "new" unless it was so compelled that it was not even susceptible to debate among reasonable judicial minds. *Butler v. McKellar, supra,* 494 U.S., at 415. Aside from the Ninth Circuit's apparent recognition of the lack of pre-existing authority that absolutely "compelled" the result it reached in this case, other circumstances also serve to establish that the panel's constitutionalization of the allocution right amounted to a "new rule" proscribed by *Teague.* In this case, the dissenting judge on the

Conversely, the State litigant cannot easily predict, in advance of the federal court's actual decision on the *habeas corpus* petition, whether the contours of the precise rule ultimately invoked in granting relief identify it as "new" or not. In this case, for example, the appellate court theoretically might have chosen any combination of a variety of circumstances as forming the basis for finding the due process violation in the denial of Boardman's request to speak to the sentencing judge. At least for the purpose of avoiding an inferred waiver of its *Teague* defense, it should be enough for the state, as it did in the instant case, to argue that the Constitution and authorities interpreting it do not support the state prisoner's petition for *habeas corpus* relief.

Therefore, there is a need for the Court to resolve the question of whether a federal court should always address the *Teague* retroactivity question as a threshold matter, or whether it may refuse to enforce *Teague* by inferring an implicit waiver of the defense from the State's failure to specifically raise it as such.

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panel, the district court judge, the magistrate judge, and the three justices on the state Court of Appeal, all determined that Boardman did not have a due process right to personally address the trial court judge before sentencing. It cannot be denied that reasonable judicial minds could differ, and have differed, on the question of whether the right of allocution is protected by the Constitution. See *Sawyer v. Smith, supra,* 497 U.S., at ___, 111 L.Ed.2d 193, 207-208; *Saffle, supra,* at 494; *Butler v. McKellar, supra,* ___ U.S., at 415.

2. The question of whether the Constitution guarantees a right of allocution in criminal sentencing is an important one that has been left open in prior decisions of this Court and that has been resolved in conflicting ways by the various circuit courts of appeals.

Independent from the *Teague* issue, this case also presents the certworthy question of whether the Due Process Clause's guarantee of fundamentally fair sentencing hearings requires a State to permit a criminal defendant, already represented by counsel and allowed to present evidence relevant to the sentencing decision, to speak personally to the judge prior to the imposition of punishment.

As observed in the majority opinion below, the Supreme Court has not yet decided whether the Constitution guarantees the practice of allocution. In *McGautha v. California,* 402 U.S. 183, 218, n. 22 (1971), it was noted that, "[t]his Court has not directly determined whether or to what extent the concept of due process of law requires that a defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so." In *Hill v. United States,* 368 U.S. 424, 429 (1961), this Court refused to grant collateral relief to a federal prisoner to remedy a technical violation of Rule 32(a) of the Federal Rules of Criminal Procedure that occurred when the sentencing judge neglected to ask the defendant if he had anything to say before imposition of sentence; but, in rejecting the claim for relief, this Court carefully noted that it was expressing no opinion on the question of whether collateral relief would be available to a defendant who was affirmatively denied an opportunity to speak during the sentencing hearing.

As the Ninth Circuit also observed, circuit courts of appeals have reached "conflicting results" on the question of the constitutional basis of the practice of allocution. Now joined by the Ninth Circuit, the Fourth Circuit has concluded that a denial of the defendant's request to speak at sentencing amounts to a violation of the Constitution. *Ashe v. North Carolina,* 586 F.2d 334 (4th Cir 1978), *cert. denied* 441 U.S. 966 (1979). But the Sixth Circuit has stated "that the right of allocution is not of constitutional dimension." *United States v. Coffey,* 871 F.2d 39, 40 (6th Cir. 1989).

Petitioner submits that, in light of numerous modern procedural protections, there can be no serious constitutional interest in insuring that a criminal defendant represented by a lawyer also be allowed to speak personally at a sentencing hearing. The defendant's legitimate interests at sentencing are amply protected in other ways. In this case, for example, Boardman's counsel produced extensive exhibits and many witnesses in the post-plea sentencing hearing. Counsel also argued at length on the issue of sentence.

As Judge Hall noted in her dissent in this case, "counsel could have communicated any of Boardman's arguments or concerns to the sentencing judge." Moreover, as the dissent also correctly noted, "Boardman has made no showing whatsoever that the judge relied upon false information or assumptions . . . ." Finally, the dissent also correctly observed that the majority decision constitutionalizing allocution improperly sanctions "hybrid representation" and reads the Constitution to require allowing the defendant to "choreograph special appearances by counsel" in a way this Court has rejected. *See McCaskle v. Wiggins,* 465 U.S. 168, 183 (1984).

The panel's decision in footnote 8 mentioned that the California Supreme Court, in other contexts, had recognized that the defendant's personal choices on fundamental trial matters sometimes needs to be respected. The State acknowledges that the opinions of the California Supreme Court have earned great respect among other courts and in the legal community. So, in this respect, it should also be pointed out that the California Supreme Court has determined that there is no constitutional right guaranteeing the defendant's opportunity to speak personally to the court in allocution, even in capital cases. *E.g., People v. Gallego,* 52 Cal. 3d 115, 203, 276 Cal. Rptr. 679, 802 P.2d 169 (1990); *People v. Keenan,* 46 Cal. 3d 478, 511, Cal. Rptr. 550, 258 P.2d 1081 (1988). If "allocution" is not constitutionally guaranteed in the capital context, it would follow that the right is not constitutionally guaranteed in a non-capital sentencing hearing, when the stakes are qualitatively lesser.

CONCLUSION

For these reasons, petitioner requests that a writ of certiorari issue to the Ninth Circuit Court of Appeals in this case.

Respectfully submitted,

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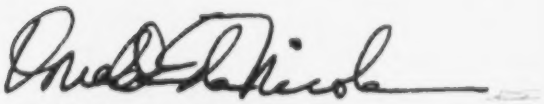

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARGUED AND SUBMITTED APRIL 1, 1991
DECIDED JANUARY 9, 1992
OPINION SUPPLEMENTED,
REHEARING DENIED MARCH 11, 1992

GARY STEWART BOARDMAN,	)	NO. 90-55238
	)	
Petitioner-Appellant,	)	
	)	
v.	)	
	)	
WAYNE ESTELLE, WARDEN,	)	
	)	
Respondent-Appellee.	)	
	)	

Before: William A. Norris, Cynthia Holcomb Hall and Stephen S. Trott, Circuit Judges.

TROTT, Circuit Judge:

> The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself. Green v. United States, 365 U.S. 301, 304 (1961) (Frankfurter, J., writing for the plurality).

Gary Boardman asserts he was denied due process of law because the state trial court refused to allow him to speak at his sentencing hearing after he affirmatively requested to do so. We agree that due process requires criminal defendants be permitted to allocute before sentencing if they so request, and we remand for consideration of whether the error in this case was harmless.

I

Boardman pleaded guilty to four counts of oral copulation and seven counts of lewd conduct, each involving children under 14 years of age. During the sentencing hearing, the judge specifically mentioned a letter received from Conrad N. Perle, the father of one of the victims, noting:

> It was an illuminating letter that I read that shows the type of damage that [Boardman has] done in matters of this nature. It creates ongoing problems for so many people. And, so, I guess I would say that . . . it was a letter that did have its effect upon me and that it would be a letter that's expressed the problems created by what went on between the defendant and young Mr. Perle.

Before making these comments, the judge stated that he did not know whether Boardman's defense counsel had seen the letter. Later in the hearing, Boardman asked through his counsel to address the court. The court denied the request, stating "I'd just as soon not, if you don't mind. Any remarks should come from you (Boardman's attorney). . . . Just in general, I find it's better not to have the defendants . . . make comments. . . . And this is from experience, believe me."

Boardman appealed his sentence, arguing he was denied due process because he was not permitted to respond personally to Mr. Perle's letter. The California Court of Appeal rejected this argument in an unpublished opinion, holding that Boardman's inability to address the court was "inconsequential" in light of other mitigating evidence and argument presented to the sentencing judge by Boardman's counsel. Relying on

California case law, the court held that a trial court has discretion to decide whether a criminal defendant represented by counsel should be allowed to speak prior to sentencing.[1/] The court further held that, in this instance, the trial court's failure to allow Boardman to speak did not constitute a due process deprivation. The California Supreme Court affirmed without opinion.

Boardman then filed a petition for habeas corpus in the district court, asserting again he was denied due process when the trial court refused his request to speak. In his traverse to the court, filed as a supplement to his habeas corpus petition, Boardman asserted that he was harmed by the court's refusal because he had intended to rebut information offered by parents of the victims. He stated in the traverse:

> One very important consideration is that the parents of the victims were expressly invited to address the court and several individuals availed themselves of this opportunity. Consequently, by silencing this petitioner, the Court deprived him of the opportunity to have his voice heard, either in answer to any accusations or to personally plead for leniency. (emphasis in original).

Although the magistrate properly framed the issue as whether a defendant who is represented by counsel in a state court proceeding has a fundamental right to speak in mitigation of his sentence, he found no such right. The magistrate concluded that Boardman was asking for an extension of Fed. R. Crim. P. 32(a)(1)(C),

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1. See People v. Sanchez, 72 Cal. App. 3d 365, 359, 140 Cal. Rptr. 110 (1977); see also People v. Wiley, 57 Cal. App. 3d 149, 166 (1976), disapproved on other grounds, People v. Wheeler, 22 Cal. 3d 258, 286 n. 35, 287, 148 Cal. Rptr. 890 (1978); People v. Cross, 213 Cal. App. 2d 678, 681-82, 28 Cal. Rptr. 918 (1963).

which requires federal judges to ask criminal defendants if they wish to address the court. He held there was no basis for extending the federal rule to state court proceedings. He also found no prejudice to Boardman, holding that in light of the "seriousness of the offenses, the harm to the victims, the danger to the community, the facts offered to the trial judge in mitigation of sentence, and the effectiveness of Petitioner's attorney, nothing suggests that anything Petitioner could have personally said would have produced a lesser sentence."

The district court adopted the magistrate's findings and recommendations and dismissed Boardman's habeas corpus petition. The court also denied his subsequent request for a certificate of probable cause, in which Boardman again argued he had been denied due process through denial of allocution. The court refused to consider Boardman's argument that he had been prejudiced by his inability to respond to damaging letters from victims' family members. The court found this argument not properly presented because it had not been raised in the habeas corpus petition or in the traverse. Boardman filed this timely appeal.

II

As a preliminary matter, we must determine whether the district court erred in finding that Boardman did not properly raise the issue of his inability to respond to the Perle letter. California asserts that Boardman now raises "for the first time in these proceedings" the claim that "he could have refuted a damaging letter presented to the state sentencing court." We are at a loss to understand California's argument as well as the district court's ruling. In his traverse, Boardman clearly stated that because he was not permitted to speak at sentencing, he could not rebut information presented to

the court by the victims' parents. In his request for probable cause certification, Boardman again raised the issue. Because Boardman did timely and repeatedly raise this issue, we conclude the district court erred in refusing to consider his claim.

III

We now turn to the primary issue in this case: whether a criminal defendant is denied due process if the trial court denies his request to address the court prior to sentencing.[2/] Finding no such right, the magistrate below could identify no basis for a right of allocution other than the Federal Rules of Criminal Procedure, which do not apply to state court proceedings. We believe the lower court erred both in overlooking the ancient origins of this common-law right and in failing to recognize the continuing importance of the interests protected by affording the defendant the opportunity to

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2. We reject California's transparent attempt to focus our attention on Boardman's crimes rather than on the significant Constitutional question he raises. California argues that Boardman was not harmed by denial of allocution because of the offensive nature of his crimes. "What justification would a child molester who furnishes children drugs offer in his behalf?" The repugnant nature of those crimes makes it all the more vital that he have the opportunity to explain his actions and plead for leniency from the court. See, e.g., In re Gustafson, 650 F.2d 1017, 1027 (9th Cir. 1981) ("Even a defendant convicted of the most heinous crime has the right to address the court prior to sentencing and thus apologize for or explain his or her conduct.") Because we conclude that the right to speak is of Constitutional dimension, see infra, California's view would limit the Constitutional rights of those defendants who commit unusually distasteful crimes. We cannot accept such a result.

speak on his own behalf.[3] Accordingly, we reverse.

Sentencing is a critical stage of the criminal process, Mempa v. Rhay, 389 U.S. 128, 133-34 (1967), to which Constitutional due process guarantees apply. United States v. Lundien, 769 F.2d 981, 986 (4th Cir. 1985), cert. denied, 474 U.S. 1064 (1986). The requirements of due process "cannot be ascertained through mechanical application of a formula," but are determined by "'history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.' " Groppi v. Leslie, 404 U.S. 496, 500 (1972) (quoting Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring)). In the context of criminal law, the backbone of that democratic faith is the right of a criminal defendant to defend himself against his accusers; and it has long been recognized that allocution, the right of the defendant to personally address the court,[4] is an essential element of a criminal defense. Specifically, the right of allocution "contemplates an opportunity for the defendant to bring mitigating circumstances to the attention of the court." Sherman v. United States, 383 F.2d 837, 839 (9th Cir. 1967).

Denial of the "traditional right of a criminal defendant to allocution prior to the imposition of sentence," Groppi, 404 U.S. at 501, was recognized as

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3. We agree with the dissent that due process precludes a sentencing judge from relying on materially untrue information or assumptions. However, we believe that due process during a sentencing hearing affords the defendant rights beyond merely preventing the sentencing judge from considering untrue information.

4. "Allocution: Formality of court's inquiry of prisoner as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction." Black's Law Dictionary 70 (5th ed. 1979).

requiring reversal as early as 1689. Green v. United States, 365 U.S. 301, 304 (1961); Del Piano v. United States, 575 F.2d 1066, 1069 (3rd Cir. 1978). When the right of allocution matured under English common law, however, a criminal defendant was not permitted counsel and could not testify on his own behalf. State v. Carr, 172 Conn. 458, 473, 374 A.2d 1107, 1115 (1977). The defendant's allocution before sentencing was his only opportunity to address the court. Even though the form of criminal trials has changed significantly over time, the interests supporting the right of a defendant personally to address his sentencer have remained constant. In this regard, the Supreme Court found in 1961 that allocution is still a vital part of the sentencing process.

> We are not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century - the sharp decrease in the number of crimes which were punishable by death, the right of the defendant to testify on his own behalf, and the right to counsel. But we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. Green, 365 U.S. at 304.[5]

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5. The dissent summarily dismisses Green on the premise that it is inapplicable because the Court was construing Rule 32(a). However, the dissent does not account for the Court's explicit discussion of the distinct rights underlying the "modern innovations" of procedural rules.

After recognizing the importance of the right of allocution in Green, the Supreme Court concluded the following year in Hill v. United States, 368 U.S. 424 (1962), that a sentencing judge's failure to ask a defendant if he had anything to say, although a violation of Fed. R. Crim. P. 32(a)(1)(C),[6] was not an error of Constitutional dimension and could not support a writ of habeas corpus. The Court noted, however, that it was not presented with a defendant who was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed.

> Nor is it suggested that in imposing the sentence the [judge] was either misinformed or uninformed as to any relevant circumstances. Indeed there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether [habeas corpus] relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider. Id. at 429 (emphasis added).

Hill therefore left open the question of whether a defendant who asks the court to speak has a Constitutionally guaranteed right to do so.

The next term, the Court hinted at how this open

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6. The common-law right of allocution has been codified at Rule 32(a)(1)(C) of the Federal Rules of Criminal Procedure. United States v. Franklin, 902 F.2d 501, 507 (7th Cir.), cert. denied, _ U.S. _, 111 S.Ct. 274 (1990). Failure to comply with Rule 32(a)(1)(C) requires remand for resentencing. United States v. Navarro-Flores, 628 F.2d 1178, 1184 (9th Cir. 1980); see also United States v. Moree, 928 F.2d 654, 656 (5th Cir. 1991); United States v. Walker, 896 F.2d 295, 301 (8th Cir. 1990).

question should be answered. In United States v. Behrens, 375 U.S. 162 (1963), the Court again affirmed the importance of a federal defendant's personal right to speak before sentencing, holding that the district court erred in modifying the defendant's sentence in his absence. Justice Black, writing for the Court, described allocution as a right "ancient in the law," which the defendant must be allowed to invoke just prior to sentencing. Id. at 165. "It is then that the right of the defendant to be afforded an opportunity to make a statement to the judge in his own behalf is of most importance." Id. In his concurring opinion, Justice Harlan described allocution as an "elementary right." Id. at 167. He observed: "Even if he has spoken earlier, a defendant has no assurance that when the time comes for final sentence the district judge will remember the defendant's words in his absence and give them due weight." Id. at 168. Justice Black noted that the right of allocution is "recognized" in Fed. R. Crim. P. 32(a). Id. at 165. Justice Harlan described this "elementary right" as "embodied" in Rule 32(a). Id. at 167. See also McGautha v. California, 402 U.S. 183, 217 (1971) (allocution is a right of "immemorial origin"). We read this to express the Justices' view that there is a long-standing basis for the right of allocution, separate and independent of the entitlement created by Rule 32(a).

Most recently, the Court explicitly recognized in McGautha that it had not yet confirmed the Constitutional basis for the right of allocution: "This Court has not directly determined whether or to what extent the concept of due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so." Id. at 218 n. 22 (rejecting defendant's claim that he was denied the right

of allocution because guilt and penalty were determined in one proceeding, and his statements in asking for leniency in sentencing could be considered in determining guilt). The Court assumed without deciding that the Constitution does require that the trial court permit a defendant to speak at sentencing if he so requests. Id. at 218-19. It is precisely this lingering question that we must decide today.

IV

California first argues that a defendant who elects to be represented by counsel has no right to speak in his own behalf. The California courts have adopted this view, finding no right of allocution for a represented defendant. "The [defendant] was represented by counsel and it was the function of that counsel, rather than of the defendant himself, to address the court on the defendant's behalf." People v. Cross, 213 Cal.App.2d 678, 682, 28 Cal. Rptr. 918 (1963).

We reject this argument. A defendant who chooses to be represented by counsel does not waive his right to allocution.[7] "That a defendant is entitled to representation of counsel at all stages of the proceedings, including sentencing, does not necessarily mean he cannot speak 'in his own behalf' . . . in mitigation of punishment." Taylor v. United States, 285 F.2d 703, 705

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7. The dissent worries about creating a right of "hybrid" representation. However, a defendant's right of allocution is entirely separate from a defendant's right to be represented by counsel. The right of allocution can be analogized to a defendant's right to testify on his behalf. A defendant who elects representation by counsel does not simultaneously waive his right to testify at trial. Similarly, a defendant who presents his case through a surrogate, his attorney, does not forego the right to personally address a sentencing judge before imposition of sentence.

(9th Cir. 1960) (permitting counsel to speak does not satisfy Rule 32(a)'s requirement that the defendant personally be offered the opportunity to speak). A defendant's choice to be represented by counsel is not a complete surrender of his right to direct his defense,[8] and does not permit a court forcibly to interpose that counsel between the defendant and the exercise of his personal rights.

> When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.

Adams v. United States ex rel. McCann, 317 U.S. 269, 279-80 (1942), quoted in Faretta v. California, 422 U.S. 806, 815 (1975). The Sixth Amendment "does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to

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8. The California Supreme Court recently reaffirmed a criminal defendant's right to control certain areas of his defense in People v. Bloom, 48 Cal. 3d 1194, 1221, 259 Cal. Rptr. 669 (1989), cert. denied, _ U.S. _, 110 S. Ct. 1503 (1990).

> On numerous occasions, we have "recognized the need to respect the defendant's personal choice on the most 'fundamental' decisions in a criminal case." (People v. Frierson (1985) 39 Cal. 3d 803, 814.) Thus even in a capital case defense counsel has no power to prevent the defendant from testifying at trial (People v. Lucky (1988) 45 Cal. 3d 259, 282 [cert. denied, 488 U.S. 1034 (1989)]) and the defendant may testify at the penalty phase to a preference for the death penalty (People v. Guzman (1988) 45 Cal. 3d 915, 961-963 [cert. denied, 488 U.S. 1050 (1989)]; People v. Grant (1988) 45 Cal. 3d 829, 849-850 [cert. denied, 488 U.S. 1050 (1989)]).
>
> . . . This court endorses the view that both court and counsel are obligated to respect a competent defendant's considered and voluntary decisions on matters of fundamental importance affecting trial of the action . . . . (footnote omitted) (citations omitted).

make his defense." Faretta, 422 U.S. at 819 (emphasis added) (holding that a defendant has a right of self-representation guaranteed by the Sixth Amendment). Because we find the right to allocute at sentencing to have the same personal quality as the right to make a defense, we reject California's argument that Boardman abandoned his right of allocution when he retained counsel.

V

Boardman was affirmatively denied an opportunity to speak. Furthermore, he asserts that he would have responded to the victim's parent's letter, unlike the Hill defendant who did not claim he "would have had anything at all to say." Hill, 368 U.S. at 429. Although we have not yet decided this issue,[9] our sister circuits have reached conflicting results.

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9. We have obliquely touched on the issue in two cases. Most recently, Judge Reinhardt relied on Ashe v. North Carolina, 586 F.2d 334 (4th Cir. 1978), see discussion infra, in his dissent from the original panel opinion in Coleman v. Risley, 839 F.2d 434, 493 (9th Cir. 1988), withdrawn, rev'd sub nom. Coleman v. McCormick, 874 F.2d 1280 (9th Cir. 1989) (en banc), in which he pressed the importance of permitting a defendant to comment before sentencing. In Coleman, however, the issue was the trial judge's failure to consider statements by the defendant's counsel prior to sentencing, not an affirmative denial of the defendant's personal right of allocution.

We also grazed this issue in Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973), cert. denied, 414 U.S. 1161 (1974), holding that a contemnor's right to be heard in his own defense was "undoubtedly a 'fundamental right.' " Weiss does not control the present case, however, because there neither the defendant nor his attorney were given the opportunity to be heard prior to sentencing. Furthermore, the Weiss defendant did not make a request to address the court, as did Boardman.

The Fourth Circuit, confronted with facts very similar to those presented here, found that the right of allocution was Constitutionally guaranteed. In Ashe v. North Carolina, 586 F.2d 334 (4th Cir. 1978), cert. denied 441 U.S. 966 (1979), two state court defendants sought to address the court prior to sentencing. The judge denied their request. The defendants filed a habeas corpus petition in federal court, asserting they were denied due process because they were not afforded the right of allocution. The Fourth Circuit agreed, noting that the Supreme Court had left this issue open in Hill. "We think that when a defendant effectively communicates his desire to the trial judge to speak prior to the imposition of sentence, it is a denial of due process not to grant the defendant's request." Id. at 336; see also United States v. Miller, 849 F.2d 896, 897 (4th Cir. 1988) (citing Ashe for proposition that defendant must be permitted to speak for reasonable amount of time).

Other circuits have also found the right of allocution to be Constitutionally guaranteed, although none has engaged in even the brief analysis of Ashe. The Fifth and Eleventh Circuits have held that a defendant's rights to be present and to allocute at sentencing are of Constitutional dimension. United States v. Moree, 928 F.2d 654, 656 (5th Cir. 1991) (citing United States v. Huff, 512 F.2d 66, 71 (5th Cir. 1975)[10/]);

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10. The basis for the court's reliance on Huff is not clear. Huff concerned a defendant who was denied the opportunity to respond to materials delivered ex parte to the sentencing judge. In remanding for resentencing, the court noted that the right to be present and to be represented at sentencing is Constitutionally based. The court stressed the importance of permitting a defendant to respond to all prejudicial pre-sentence material submitted by the prosecution. However, nowhere does the Huff court state that the right to allocute is constitutionally based.

United States v. Jackson, 923 F.2d 1494, 1496 (11th Cir. 1991) (also relying on Huff). But see United States v. Fleming, 849 F.2d 568, 569 (11th Cir. 1988) (right to allocution not Constitutional, citing Hill).

Some circuits, on the other hand, have concluded that the right of allocution is not Constitutionally secured. These circuits rely primarily on Hill's statement that a trial judge's failure "to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed" is not a Constitutional error. Hill, 368 U.S. at 428; United States v. Coffey, 871 F.2d 39, 40 (6th Cir. 1989) (no constitutional basis for allocution, citing Hill); Fleming, 849 F.2d at 569 (same). In Coffey, the Sixth Circuit relied on Hill to find no Constitutional violation. The Coffey defendant, however, did not ask to address the court, and hence there was no affirmative denial as there was in the present case. See United States v. Prince, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, _ U.S. _, 110 S.Ct. 321 (1989) (no Constitutional violation where defendant did not ask to address the court); United States v. De La Paz, 698 F.2d 695, 697 (5th Cir. 1983) (citing Hill for the proposition that failure to offer the defendant the opportunity to speak is "not a fundamental defect.")

All of the cases denying Constitutional status to allocution are factually distinguishable because they do not involve the denial of an affirmative request to speak, as in the present case. More importantly, however, we find their reasoning unpersuasive because, in finding that allocution has no Constitutional basis, they overstate Hill's carefully defined holding. These circuits ignore the Court's limiting comment that it did not consider the impact of "aggravating circumstances" under which a denial of allocution might be a due process violation. Because we read Hill more narrowly, and with emphasis on the Court's acknowledgment of the limits of its

holding, we do not adopt the reasoning of these circuits.

Recognizing the personal nature of the Sixth Amendment's guarantee of the right to make a defense, the unique ability of a defendant to plead on his own behalf, and the Supreme Court's acknowledgment of the continuing vitality of the practice of permitting a defendant to allocute before sentencing, we hold that allocution is a right guaranteed by the due process clause of the Constitution. Our holding is limited to circumstances in which a defendant, either unrepresented or represented by counsel, makes a request that he be permitted to speak to the trial court before sentencing. If the trial court denies that request, the defendant has not received due process.

VI

We next consider whether such a denial of due process can be held harmless. Because we find denial of allocution subject to harmless error analysis, we remand to the district court to determine whether it was harmless in this case.

Most errors of Constitutional magnitude are subject to harmless error analysis, except those "which are so basic to a fair trial that their infraction can never be treated as harmless error." Arizona v. Fulminante, _ U.S. _, 111 S.Ct. 1246, 1263-64 (1991) (Rehnquist, J., writing section II for the Court); see also Clemons v. Mississippi, _ U.S. _, 110 S.Ct. 1441, 1450-51 (1990) (Constitutionally permissible to apply harmless error analysis to instructional error that affected sentencing). The Supreme Court has distinguished between errors which affect "the framework within which the trial proceeds," which can never be harmless, and errors in the trial itself. Fulminante, 111 S.Ct. at 1265. The latter class of errors, even when they implicate significant Constitutional

rights or involve serious police misconduct, are subject to harmless error analysis. Id. Denial of the right of allocution is an error in the conduct of the trial, not a structural defect in the trial process. As such, we find that it is not a fundamental defect and so may be treated as harmless. We agree with the Fourth Circuit's approach in Ashe, in which the court remanded to the district court for a determination of whether the defendants actually asked to speak, and what they would have said if given the requested opportunity.

Should this information prove to be irrelevant or cumulative in view of statements by their attorney at sentencing, the denial of their right to speak may be found to be harmless error. Otherwise, if the request was made and denied, petitioners' sentences must be vacated, and they should be resentenced in a proceeding which allows them the opportunity to speak in their own behalf. Ashe, 586 F.2d at 337.

In the present case, the sentencing hearing transcript establishes that Boardman, through his counsel, made a request to address the court. Boardman asserts that he was prejudiced by his inability to respond to a letter from Mr. Perle, one of the victim's parents. In discussing the impact of the letter at sentencing, the trial court judge said to Boardman's attorney "I don't know if you saw [the letter]." There has been no determination of whether either Boardman or his attorney saw the letter. Furthermore, we do not know what statements Boardman would have made to the court. Based on this record, we are unable to determine whether the error was harmless. We remand for a determination of whether Boardman did see the letter, and what he would have said in his defense if permitted to speak. If the district court determines that the denial of allocution was not harmless, the case should be returned to the state courts so Boardman can be resentenced after exercising his right of

allocution.

REVERSED and REMANDED.

DISSENT: HALL, Circuit Judge, dissenting:

I believe the majority errs by finding that Boardman had a constitutional right to personally address the court at his sentencing. In my view, the majority transforms the common law right of allocution into a federal constitutional mandate. The majority's holding is at odds with the wide discretion enjoyed by sentencing judges and the accordingly narrow due process rights of defendants at sentencing. The majority, moreover, cavalierly and unwisely places its stamp of approval upon "hybrid representation" of a criminal defendant by allowing Boardman all the advantages of proceeding pro se and through counsel. With all due respect, I must dissent.

I

At its outset, the majority's analysis veers onto the wrong track by failing to examine the general contours of due process at sentencing before proceeding to the highly specific question of allocution. To determine what process is due a defendant in a state court sentencing proceeding, we must first look to Williams v. New York, 337 U.S. 241 (1949).[11] In Williams, the Supreme Court

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11. Because the Supreme Court's attention has been focused upon the process due to defendants in capital cases, we must be careful not to confuse the rules applicable to capital and non-capital sentencing. See Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion) (Williams was decided before the Court recognized that "death is a different kind of punishment from any other"). Williams appears to remain the starting point for analyzing sentencing hearings in non-capital cases. See Creech v. Arave, No. 86-3983, slip op. 14321, 14338 n.7 (9th Cir. Oct. 16, 1991); Brothers v. Dowdle, 817 F.2d 1388, 1390 (9th Cir. 1987).

upheld a sentence imposed by a state judge on the basis of a presentence report containing hearsay. The Court sharply distinguished procedures appropriate for the guilt phase of a state criminal trial from those appropriate for the sentencing determination:

> Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. Id. at 246.

The judge's wide discretion at sentencing accommodates a state's policy of tailoring a sentence to the individual defendant's culpability and capacity for reform. Id. at 247-51.

In fact, there is no constitutional right to a sentencing hearing at all, but most states do provide for such a hearing. Specht v. Patterson, 386 U.S. 605 (1967) (no right to a sentencing hearing or to participate in such a hearing); Richard B. McNamara, Constitutional Limitations on Criminal Procedure § 18.02, at 299 (1982) (constitution does not require hearing but most states provide for one). Part III of the majority's opinion notes that a sentencing hearing, if provided, is a critical stage for Sixth Amendment right to counsel purposes. That observation, however, does nothing to further our analysis of whether the Due Process Clause mandates a right to allocution. See McNamara, supra, § 18.02, at 299.

Stringent evidentiary and procedural protections are unnecessary at sentencing because "once the

reasonable-doubt standard has been applied to obtain a valid conviction, 'the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him.' " McMillan v. Pennsylvania, 477 U.S. 79, 92 n. 8 (1986) (quoting Meachum v. Fano, 427 U.S. 215, 224 (1976)). Thus, a judge may rely upon hearsay presented within a presentence investigative report. Williams, 337 U.S. at 249-51; United States v. Wondrack, 578 F.2d 808, 809-10 (9th Cir. 1978); see also Farrow v. United States, 580 F.2d 1339, 1353 n. 25 (9th Cir. 1978) (dicta) ("[A] defendant has no due process right to cross examine witnesses who supply information relied on in sentencing."). "We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination." Williams, 337 U.S. at 250. Thus, information considered by a judge at sentencing need only be supported by " 'some minimum factual basis.' " Brothers v. Dowdle, 817 F.2d 1388, 1390 (9th Cir. 1987) (quoting United States v. Petitto, 767 F.2d 607, 611 (9th Cir. 1985)).

Even though due process does not require a state court to provide a sentencing hearing, the Due Process Clause does provide some limitations on sentencing. These limitations prevent a sentencing judge from relying on materially untrue information. See Brothers, 817 F.2d at 1390. First, a sentencing court may not rely upon prior convictions obtained in violation of the right to counsel. United States v. Tucker, 404 U.S. 443, 449 (1972); United States v. Morgan, 595 F.2d 1134, 1136 (9th Cir. 1979). Boardman does not argue that his sentencing judge relied upon any such convictions.

Second, due process forbids a defendant's sentence being based upon "assumptions concerning his criminal record which [are] materially untrue." Townsend v.

Burke, 334 U.S. 736, 741 (1948). In Burke, the Court held that due process was violated when a sentencing court mistakenly believed the petitioner to have been convicted of certain crimes in the past. The court had erroneously recounted three prior "convictions" at sentencing when the petitioner had, in fact, been acquitted of two of those prior charges and the charges were dismissed in the third. Id. at 740. The Court emphasized that the unrepresented petitioner was unable to correct the sentencing court's mistaken information about his criminal history:

> It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process. Id. at 741.

Thus, I believe that the only hook that Boardman can hang a due process claim upon is a showing that his sentencing judge relied on materially untrue information in formulating his sentence.

Boardman argues that the sentencing judge acted inappropriately by considering a letter from a parent of one of his victims without allowing Boardman to personally respond to the letter. Boardman does not, and could not, argue that consideration of the letter was itself a due process violation. The parent's account of the effects of Boardman's behavior on his victim has a sufficient factual basis to satisfy due process. Indeed, the Supreme Court has held that such "victim impact statements" may be considered by courts at sentencing. See Payne v. Tennessee, 111 S.Ct. 2597, 2608 (1991) (upholding over eighth amendment challenge admission

of victim impact evidence at sentencing phase of capital trial).

Boardman only argues that his inability to personally address the court violated his right to due process at sentencing. Boardman has made no showing whatsoever that the judge relied upon false information or assumptions, and has proffered nothing in his argument to this court that he would have liked to tell the court at sentencing. Cf. Lankford v. Idaho, 111 S.Ct. 1723, 1730-31 (1991) (due process violated when sentencing judge led defense counsel to believe that he was not considering imposition of death penalty and then sentenced defendant to death because defense counsel "would have advanced arguments that addressed these circumstances"). Thus, Burke and Lankford teach us that the judge's refusal to allow Boardman to speak personally did not violate due process because that refusal did not cause the judge to rely upon inaccurate information in sentencing Boardman.

Moreover, Boardman was not rendered unable to respond to the judge or to the letter. Unlike the petitioner in Burke, Boardman was represented by counsel. His counsel could have communicated any of Boardman's arguments or concerns to the sentencing judge. "Underlying the right to allocution . . . is the theme that matters in mitigation of sentence should be fairly presented to a sentencing judge prior to rendition of final sentence." Katz v. King, 627 F.2d 568, 576 (1st Cir. 1980) (noting uncertain parameters of due process at non-capital sentencing without deciding whether right to allocution is constitutional or statutory). Boardman could have corrected any erroneous assumptions held by the judge through his lawyer. Thus, I believe that the refusal of the sentencing judge to allow Boardman to personally address the court did not violate his right to due process.

My conclusion is consistent with the history of the right to allocution. At common law, allocution was not an opportunity for the defendant to plead for mercy because a sentence of death was mandatory for most felonies. Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv. L. Rev. 821, 821 n. 2, 832 (1968). Instead, its function was "to give the defendant a formal opportunity to present one of the strictly defined legal reasons which required the avoidance or delay of sentencing." Id. at 832-33. It seems to me, then, that the functional interests served by allocution can properly be assigned to counsel by a sentencing judge. See id. at 833 ("Since an affirmative answer to the allocutus has to be a showing of a legal ground why sentence should not be pronounced, it would seem appropriate, where the defendant has counsel, to put the question to counsel rather than to the defendant himself.").

Federal Rule of Criminal Procedure 32(a) now mandates that the right of allocution be afforded in federal criminal trials. The majority relies heavily upon cases interpreting that rule to discover a Constitutional right to allocution. See, e.g., Hill v. United States, 368 U.S. 424 (1962); Green v. United States, 365 U.S. 301 (1961). Those cases, however, tell us nothing about what the Constitution mandates in a state court sentencing proceeding. See Note, supra, at 832 (rule 32(a) codifies a common law right). If anything, Hill teaches us that the right to allocution is not embodied in the Constitution. Hill held that the failure of the federal sentencing judge to ask the defendant sua sponte whether he wished to speak was a violation of Rule 32(a). Hill, 368 U.S. at 426. The Court plainly held that the error was not constitutional in nature. Id. at 428. Thus, Hill, Green, and other cases interpreting Rule 32(a) are simply immaterial to our determination of what

procedures the Due Process Clause mandates in a state court sentencing proceeding.

The majority's failure to focus upon cases interpreting the Due Process Clause in order to discover what process was due Boardman in his state court sentencing proceeding has led it astray. Both Burke and Tucker inform us that no due process violation has occurred here because Boardman was not sentenced based upon inaccurate or unreliable information. Boardman's asserted right to allocute at sentencing is not grounded upon a desire to correct mistaken factual or assumptive beliefs held by the sentencing judge. Even had Boardman harbored grievances with the sentencing judge's information or beliefs, Boardman's counsel provided a ready avenue for him to convey those concerns to the judge. Thus, the majority's conclusion that due process mandates a right to allocution at sentencing is in error because it ignores the larger due process structure upon which it purports to rely.

II

The majority's holding effectively grants Boardman a right to hybrid representation by holding that he had the constitutional right o interact directly with the court even though he was represented by counsel. The Supreme Court has cautioned that hybrid representation is not mandated by the Sixth Amendment. See McCaskle v. Wiggins, 465 U.S. 168, 183 (1984) (appointment of standby counsel does not violate right to self-representation, but pro se defendant may not demand such assistance).

A criminal defendant must expressly and unequivocally waive his Sixth Amendment right to counsel in order to invoke his right to self-representation. Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989).

When a defendant equivocates, he is presumed to have requested the assistance of counsel because exercising the right to self-representation is generally believed to be against the best interests of defendants untrained in the law. Jackson v. Ylst, 921 F.2d 882, 889 (9th Cir. 1990). Boardman at no time unequivocally expressed a desire to represent himself and forego the assistance of counsel. See, e.g., Meeks v. Craven, 482 F.2d 465, 467 (9th Cir. 1973) (passing statement of defendant invoking right to self-representation was a "prototype of equivocation"). Thus, Boardman cannot claim a right to allocute based upon the right of self-representation because he did not waive his right to representation.

In addition to imperiling criminal defendants' right to counsel, the majority's analysis seriously undermines the integrity of criminal trials by creating "a constitutional right to choreograph special appearances by counsel." Wiggins, 465 U.S. at 183 (mocking such a result). Under the majority's analysis, a criminal defendant who vacillates about whether he chooses to be represented by counsel will always be able to argue on appeal either that he was denied the right to assistance of counsel or the right to represent himself. Because I believe that the majority opinion is therefore most unwise, I respectfully dissent.

The slip opinion in this case, Boardman v. Estelle. No. 90-55238, slip op. 105 (9th Cir. Jan. 9, 1992), is supplemented as follows:

PER CURIAM:

In our earlier opinion in this case, we held that a criminal defendant has a Constitutional right to speak at his sentencing hearing after he affirmatively requests to do so. Boardman v. Estelle, No. 90-55238, slip op. 105 (9th Cir. Jan. 9, 1992). The state now contends for the first time, in a petition for rehearing, that our holding created a "new rule" on habeas, in violation of the

doctrine of Teague v. Lane, 489 U.S. 288 (1989). The state argues it has the right belatedly to avail itself of the Teague (new-rule) defense. We deny the petition for rehearing because the state has waived the Teague defense in this case.

The Supreme Court has not yet decided whether a state may waive the Teague defense by failing timely to raise it. See Marc M. Arkin, The Prisoner's Dilemma: Life in the Lower Federal Courts After Teague v. Lane, 69 N. C. L. Rev. 371, 415-16 (1991) ("The question of when the government may waive a Teague nonretroactivity defense is not clearly settled. . . . While the Supreme Court has now decided that the government may explicitly waive a Teague nonretroactivity claim, it has not given the lower courts guidance regarding any other circumstances under which such a waiver should be found." (footnotes omitted)).

Some circuits (including this one) have allowed waiver, and others have not, but none has engaged in any significant analysis on the issue. See Adamson v. Lewis, No. 84-2069, slip op. 939, 942, 952 (9th Cir. Jan. 30, 1992) (Teague defense argued for the first time on fifth appeal and third en banc proceeding; defense "not appropriate to be raised at this late stage"); Coe v. Thurman, 922 F.2d 528, 533 n. 1 (9th Cir. 1990) (authored opinion with per curiam addition in 1991) (court has "discretion" to address Teague defense raised for the first time in petition for rehearing); Maynard v. Dixon, 943 F.2d 407, 418 (4th Cir. 1991) ("assuming, without deciding, that the State waived its defense of non-retroactivity . . . that may have been available to it under Teague v. Lane"), cert. denied, 60 U.S.L.W. 3499, 1992 U.S. LEXIS 470 (U.S. Dec. 23, 1991) (No. 91-6264); Smith v. Black, 904 F.2d 950, 981 n. 12 (5th Cir. 1990) ("we believe the better choice is to reach the Teague issue now pressed by the State"); Kordenbrock v.

Scroggy, 919 F.2d 1091, 1104 n. 4 (6th Cir. 1990) (en banc) ("The state has waived any argument based on Teague"), cert. denied, 111 S.Ct. 1608 (1991); Hill v. McMackin, 893 F.2d 810, 813 (6th Cir. 1989) ("Although the parties did not address the question whether the rule . . . may be applied retroactively, we find ourselves compelled to do so in light of . . . Teague v. Lane . . . ."), disapproved on other grounds, Ylst v. Nunnemaker, 111 S.Ct. 2590 (1991), as noted in Couch v. Jabe, 951 F.2d 94, 96 (6th Cir. 1991) (per curiam); Hanrahan v. Thieret, 933 F.2d 1328, 1337 n. 19 (7th Cir.), cert. denied, 112 S.Ct. 446 (1991); Hopkinson v. Shillinger, 888 F.2d 1286, 1288 (10th Cir. 1989) (en banc) ("We hold that the nonretroactivity defense is not waived, and should be considered"), cert. denied, 110 S.Ct. 3256 (1990); Card v. Dugger, 911 F.2d 1494, 1523 n. 30 (11th Cir. 1990).

Ordinarily, arguments not timely presented are deemed waived. E.g., Winebrenner v. United States, 924 F.2d 851, 856 n. 7 (9th Cir. 1991). This general doctrine of waiver applies to arguments raised for the first time in a petition for rehearing. United States v. Lewis, 798 F.2d 1250, 1250 (9th Cir. 1986) (order amending opinion published at 787 F.2d 1318 (9th Cir. 1986), and denying petition for rehearing and rehearing en banc).

The state implicitly argues the Teague defense is not subject to this ordinary rule, however, because Teague doctrine is grounded in concerns for comity and federalism. See Teague, 489 U.S. at 308-10; cf. Younger v. Harris, 401 U.S. 37, 43-54 (1971), cited in Teague, 489 U.S. at 310. A state may waive Younger only by express statement, not through failure to raise the issue. See Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471, 480 (1977). Thus, by analogy to Younger, it might appear that silence by the state implies nonwaiver of the Teague defense.

Rather than pursuing the analogy to Younger, however, we follow an analogy that is closer to home: Granberry v. Greer, 481 U.S. 129 (1987), a unanimous Supreme Court decision which discussed waiver by a state of the nonexhaustion defense in habeas corpus. In Granberry, Illinois filed a Fed. R. Civ. P. 12(b)(6) motion in response to Granberry's habeas petition. Id. at 130. On appeal from the dismissal of the petition, Illinois argued for the first time that Granberry had not exhausted his state remedies; Granberry claimed the issue was waived. Id.

The heart of the Supreme Court's opinion considered the history and principles behind the exhaustion requirement: "comity and federalism . . . ." Id. at 134. Noting the importance of good federal-state relations, the Court nonetheless instructed the circuits to "take a fresh look at the issue" of waiver when the state had failed to raise the exhaustion defense in the district court. Id.

For the resolution of this case, Granberry provides a better analogue than Younger. Like this case, and unlike Younger, Granberry deals with a waiver by the state of a habeas corpus defense. Further, the Teague defense at issue in this case, like the exhaustion defense at issue in Granberry, is grounded in concerns for comity and federalism. Compare Collins v. Youngblood, 110 S.Ct. 2715, 2718 (1990) ("the Teague rule is grounded in important considerations of federal-state relations") with Granberry, 481 U.S. at 134 (discussing "the interests of comity and federalism" as the basis for the exhaustion doctrine).

Of course Granberry is distinguishable from this case because a habeas petitioner who fails to exhaust his state remedies may return to federal court once he has exhausted those remedies. Thus, the issue in Granberry was whether to reach the merits of the habeas petition

now, or later. See Granberry, 481 U.S. at 134-35. The rule is one of timing and therefore controls when, not if, federal courts will review a state court conviction. Here, the issue is whether to reach the merits now, or never. But the reasoning of Granberry on the nonexhaustion defense applies fully to the Teague defense. Granberry is distinguishable, but not in a meaningful way.[12/]

Following the imperfect analogy to Granberry, its approach is instructive here:

How an appellate court ought to handle a nonexhausted habeas petition when the State has not raised this objection in the district court is a question that might be answered in three different ways. We might treat the State's silence on the matter as a procedural default precluding the State from raising the issue on appeal. At the other extreme, we might treat nonexhaustion as an inflexible bar to consideration of the merits of the petition by the federal court, and therefore require that a petition be dismissed when it appears that there has been a failure to exhaust. Or, third, we might adopt an intermediate approach and direct the courts of appeals to exercise discretion in each case to decide whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith. Id. at 131 (footnotes

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12. In Youngblood, the Court noted the Teague rule is not "jurisdictional." Youngblood, 110 S.Ct. at 2718. As authority for this proposition, the Court provided the following citation: "Cf. Patsy v. Board of Regents of Fla., 457 U.S. 496, 515 n. 19 . . . (Eleventh Amendment defense need not be raised and decided by the Court on its own motion)." Id. This might suggest the Court sees the Eleventh Amendment as the best analogy for the resolution of this case. Without more explicit guidance from the Court, however, we will not delve into the Eleventh Amendment when Granberry is so close at hand.

omitted).

The same three possibilities apply to a state's failure to raise an objection to a habeas petitioner's reliance on a new Constitutional rule. And here, as in Granberry, the Court already has excluded the first two possibilities.

At the first extreme, the state's failure to raise the exhaustion or Teague defenses is not a "procedural default" by the state, and does not absolutely bar appellate courts from raising sua sponte those defenses. Compare Saffle v. Parks, 494 U.S. 484, 496 n. 1 (1990) (Brennan, J., dissenting) ("Although [this] case was briefed and argued after Teague, neither of the parties nor any amicus briefed the retroactivity issue") and Zant v. Moore, 489 U.S. 836, 837 (Blackmun, J., dissenting) ("petitioner did not raise retroactivity as a defense to respondent's claim for federal habeas relief, and that defense therefore should be deemed waived") with Granberry, 481 U.S. at 133 ("The appellate court . . . is not obligated to regard the State's [failure to argue nonexhaustion] as an absolute waiver of the claim").

At the other extreme, a petitioner's failure to exhaust state remedies, like a petitioner's reliance on a new Constitutional rule, is not "an inflexible bar to consideration of the merits." Compare Youngblood, 110 S.Ct. at 2718 ("Although the Teague rule is grounded in important considerations of federal-state relations, we think it is not 'jurisdictional' in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue sua sponte") with Granberry, 481 U.S. at 131 ("We have already decided that the failure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application").

With the two extremes eliminated, Granberry articulates a "middle course" for appellate courts

confronting a habeas defense raised by the state for the first time on appeal. Granberry, 481 U.S. at 133. When the state fails, whether inadvertently or otherwise, to raise an arguably meritorious non-exhaustion defense, ... the court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith . . . . If a full trial has been held in the district court and it is evident that a miscarriage of justice has occurred, it may . . . be appropriate for the court of appeals to hold that the nonexhaustion defense has been waived . . . . Id. at 134-35.

Here too, the "middle course" is the best course: courts of appeals have discretion, but are not required, to address a Teague defense raised for the first time on appeal (or, perhaps, even in a petition for rehearing). As the Court noted in Granberry,

> we have also expressed our reluctance to adopt rules that allow a party to withhold raising a defense until after the 'main event' - in this case, the proceeding in the District Court - is over. Although the record indicates that the State's failure to raise the nonexhaustion defense in this case was the result of inadvertence, rather than a matter of tactics, it seems unwise to adopt a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding the exhaustion defense in reserve for use on appeal if necessary. Granberry, 481 U.S. at 132 (citations and footnote omitted).

Substituting "Teague" for "exhaustion" and "non-exhaustion" above yields a perfectly tailored argument in favor of allowing a court to find waiver of the Teague defense. Indeed, in this case, not only is the

"main event" completed, the rematch is finished as well, because we are dealing with a petition for rehearing.

Following Granberry, we have discretion to reject the Teague defense. The question then becomes: how should we exercise that discretion in this case? In Granberry, the Supreme Court advised:

> That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.

Id. at 133 (quotations omitted); see Paradis v. Arave, No. 87-4100, slip op. 667, 676-77 (9th Cir. Jan. 23, 1992) (petitioner's "failure to exhaust his remedies is waived"); Stone v. Godbehere, 894 F.2d 1131, 1135 (9th Cir. 1990) ("Where, as here, the state failed to raise an exhaustion argument before the district court, we may consider it waived if the interests of comity, federalism and justice would be served."); cf. Martinez v. Ylst, No. 89-15940, slip op. 17067, 17072-73 (9th Cir. Dec. 24, 1991) (finding waiver by state of argument that petitioner raised nonconstitutional claims on habeas corpus, and citing cases).

We will follow Stone, where this court held the exhaustion defense waived because:

> The district court has already held a full trial, and the state has not adequately justified its failure to raise the issue at that time. Moreover, reversal of the district court['s grant of habeas relief] would force Stone to return to prison on a sentence that a federal court has declared unconstitutional.

> The interests of federalism and comity do not require such an injustice. Stone, 894 F.2d at 1135.

As noted above, the reasoning of Stone applies with even greater force here because California inexplicably failed to raise the Teague defense both in the district court and on appeal.

We will not save the state from such a gaffe. The Supreme Court has enforced strict procedural forfeitures on habeas petitioners in the interests of efficient and final adjudication. Why should not the state be similarly held to a pedestrian rule of appellate procedure? Concerns of federalism and respect for a state's criminal judgments are marginal here because the state brought the problem on itself.

In short, Granberry provides the best analogy - and consequently the best guidance - for the resolution of this case. Granberry held courts of appeal have discretion to find waiver, and on facts analogous to those presented here, this circuit has found waiver. Accordingly, we will not entertain the state's new rule claim.

The state's other arguments lack merit. The petition for rehearing is DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GARY STEWART BOARDMAN, Petitioner-Appellant, v. WAYNE ESTELLE, WARDEN, Respondent-Appellee.	) SA CV 89-) 504 AHS) (RWR))) REPORT) AND) RECOMMEN-) DATION OF) UNITED) STATES) MAGISTRATE) ON A) PETITION) FOR WRIT OF) HABEAS) CORPUS BY) A PERSON IN) STATE) CUSTODY)

This Report and Recommendation is submitted pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

Petitioner, pro se and in forma pauperis, is presently in custody at the California Mens Colony at San Luis Obispo. Petitioner was originally charged with 29 felony counts of lewd conduct, oral copulation, and sodomizing seven children under the age of 14 years in violation of Cal. Penal Code sections 288(a), (c) and 286(c). On September 1, 1983, in the municipal court

of Los Angeles County petitioner pled guilty to four counts of oral copulation with a child under 14 years of age and five counts of lewd conduct with a child under 14 years of age. Petitioner further admitted the special allegations charged in counts VI and XXIII of the complaint thereby rendering him ineligible for probation on those counts. As a result of this negotiated disposition, the matter was certified for sentencing to a judge of petitioner's choice in the superior court of Los Angeles County where, on December 13, 1983, petitioner was sentenced to 22 years in state prison. (Court Transcript, hereinafter [C.T.] pp. 71-73.)

This habeas petition represents petitioner's third attempt in this court to review various matters arising out of his criminal sentencing in state court. Two previous petitions were dismissed, without prejudice in November, 1987 and on May 30, 1989 for failure to exhaust state remedies[1/] on issues virtually identical to those presented in the present petition.

ISSUES PRESENTED

1. Petitioner's right of allocution, if any, i.e., whether he was denied due process when the sentencing judge refuse to allow petitioner to personally address the court;

2. Whether the state trial court lacked authority to impose a term of imprisonment on some counts and a term of probation concerning other counts, and;

3. Whether the sentence imposed was excessive or, as petitioner claims, "disproportionate" to the offenses amounting to cruel or unusual punishment in derogation

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1. Those cases were CV 87-5193 HLH (RWR) dismissed without prejudice on November 5, 1987 and SA CV 89-91 AHS (RWR) dismissed without prejudice on May 30, 1989.

of the California Constitution.

DISCUSSION

A. Right to Address the Trial Court at Sentencing

Petitioner's principal argument concerns whether, at the time of sentencing, it was constitutionally permissible for the trial judge to deny him an opportunity to address the court personally, rather than through his attorney. The issue in his particular case, however, is not quite as broad as petitioner suggests. In more precise terms, the issue is whether a defendant in a state criminal proceeding who is represented by counsel, possesses a fundamental right to speak in mitigation of his sentence prior to its imposition. In the context of whether a constitutional violation occurred, this question must be answered in the negative.

"'Allocution' is the formal inquiry by the judge of the defendant as to whether he has any cause to show why sentence should not be pronounced." People v. Cross, 213 Cal.App.3d 678, 681, 28 Cal.Rptr. 918, 920 (1963) (citing cases).

As Respondents note, State v. Carr, 374 A.2d 1107, (Conn. 1977), explains

> At common law, the defendant in a felony case had a right called 'allocution' to be asked normally whether he had any reason to offer why judgment should not be awarded against him. To place this right in its correct historical perspective, it must be considered that under the ancient English common law a person on trial for a felony was not allowed counsel and was not a competent witness in his own behalf. Annot. 96 A.L.R.2d 1292, 1295 Sec. 3. (Resp. Ret. p. 6 citing State v. Carr, at 1115-1116.)

There is a distinction between the so-called right of allocution in a state, versus a federal, criminal

proceeding. In the federal forum, the trial court must inquire as to whether the defendant wishes to personally address the court to allow the individual an opportunity to proffer any information or statements in mitigation of punishment, regardless of whether the defendant is represented by counsel. F.R. Crim. P. Rule 32(a)(1)(c). In its present form, the rule embodies the holding in Green v. United States, 365 U.S. 301, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961), among other cases, i.e., a criminal defendant in federal court has an absolute right to address the court before sentence is imposed.

Petitioner, contends under the Federal Rules of Criminal Procedure, courts must view allocution as a fundamental due process right under the Fourteenth Amendment, the denial of which should serve as the basis for granting his application for habeas relief. Generally, in a federal habeas proceeding brought under 28 U.S.C. section 2255, an appeal of a denial of the right of allocution, as provided for in F.R. Crim. P. Rule 32(a)(1)(c), is associated with a rule 35 F.R. Crim. P. motion to correct a federal sentence. See Hill v. United States, 368 U.S. 424, 430, 82 S.Ct. 468, 472, (1962); United States v. Freeny, 841 F.2d 1000 (9th Cir. 1988).

Petitioner apparently argues for an extension of the federal rule to state proceedings yet provides no basis to do so. In effect, petitioner is asking this court to act as a legislative body which it must decline to do. Moreover, this particular extension of federal law has been rejected by the state legislature through enactment of Pen. Code, sec. 1200, et seq. and state appellate courts. People v. Cross, supra. Indeed, Rule 1, F.R. Crim. P., particularly provides that the Federal Rules of Criminal Procedure shall govern criminal proceedings in the courts of the United States. Petitioner cites no authority, and the court believes there is none, which would apply the Federal Rules of Criminal Procedure to state proceedings

absent appropriate state legislation adopting them. Thus, since this case concerns a state prisoner and was commenced under 28 U.S.C. sec. 2254, most of the authority cited by petitioner concerns federal sentencing procedures and is inapposite to the facts in the present case. Further, as it will be noted infra, there is ample case authority to the effect that state sentencing laws do not raise questions cognizable in federal habeas proceedings.

In addition, petitioner concedes that in Hill, where a federal prisoner who was sentenced in federal court and sought habeas relief under section 2255, the Supreme Court noted there is no constitutional right to allocution. Rather, it is a creature of legislative enactment. 368 U.S. at 429, 82 S.Ct. at 471. The Court also specifically noted that in a federal context, the habeas remedy was not available in circumstances which were far more compelling than those on the issue of allocution presented by Hill. Id., quoting Sunal v. Large, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982 (1947).

To support his contention, petitioner relies heavily upon Ashe v. North Carolina, 586 F.2d 334 (4th Cir. 1978), cert den. 441 U.S. 966, 99 S.Ct. 2416, 60 L.Ed.2d 1072 (1979). He contends Ashe is somehow dispositive on the issue of allocution. (Pet. Trav. p. 5.) In that case, state prisoners collaterally attacked their state sentence seeking federal habeas relief, by claiming that the trial judge refused to allow them to personally address the court at the time of sentencing. Petitioners therein were represented by counsel. The appellate court remanded the case to the district court to determine whether the petitioner had in fact made the request to speak and if so, what they wished to say to the sentencing court. On remand, if the district court was of the opinion what petitioners sought to say was either irrelevant or, in essence, duplicative of what their

attorney had stated, then the state trial court's error would be found harmless.

While Ashe may be persuasive, as out-of-circuit authority, it is neither controlling nor dispositive upon the circumstances presented in the instant case. First, a careful reading of Ashe discloses that most of the case authority relied upon by the Fourth Circuit concerned federal criminal cases. Second, the court indicated its reversal was based, in part, on two Supreme Court decisions rendered subsequent to Hill and Green, supra. Ashe, 586 F.2d 336, fn. 3. Those were Mempa v. Wray, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967) and Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). In Mempa, a prisoner from the State of Washington sought federal habeas relief arguing he was denied his constitutional right to counsel during a probation revocation proceeding. The Court held this was prejudicial to petitioner's rights at a critical stage of the criminal proceedings. As a result, the Court found a due process violation had occurred. Faretta was another case involving self-representation wherein a pro per criminal defendant refused appointment of counsel. The Court noted that although a defendant was under no obligation to have counsel represent him, generally, "when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to counsel the power to make binding decision of trial strategy in many areas." Ashe, Mempa, and Faretta, are all factually and legally distinguishable from the present case because unlike those individuals, petitioner herein was represented by counsel throughout the criminal proceedings including sentencing.

Since the gravamen of petitioner's claim, in essence, is whether he was afforded the opportunity to have a plea for mitigation heard prior to sentencing, a number of factors lead to the conclusion he was. For

example, at the sentencing hearing held on December 13, 1983, a number of witnesses, including the mother of one of the victims [Tr. p. 1-5], testified on behalf of petitioner. Dr. Paul Walker, a clinical psychologist specializing in the treatment of deviant sexual behavior also testified on behalf of petitioner along with the potential effects of various alternative therapeutic programs including counseling and medication. [TR. pp. 7-24.] The trial judge indicated he had reviewed the material presented by petitioner's counsel. [Tr. p. 14.] Similarly, Dr. Raymond Anderson, another clinical psychologist, testified on petitioner's behalf as to structuring a plan of treatment if the court granted petitioner probation. [Tr. 24-30.] Petitioner's sister testified concerning the family's remorse as to petitioner's acts, requesting mercy on his behalf and indicating petitioner's personal suffering and remorse. [Tr. p. 40.] Petitioner's mother was permitted to testify as to petitioner's positive attitude towards rehabilitation and treatment of his illness, expressing fears for petitioner's safety if he was sentenced to jail, and indicating concern for the community and her son's well being. [Tr. pp. 41-43.]

Additionally, after the trial judge denied petitioner's request to personally address the court [Tr. p. 43], his attorney of record proffered an impassioned, eloquent and apparently accurate review of the testimony on petitioner's behalf, the records and the evidence in a clear and well-reasoned request for leniency in view of the seriousness of the offenses and the gravity of petitioner's psychological illness. Petitioner's counsel cogently addressed a number of salient issues which could have been weighed by the judge along with various documents, reports, testimony and statements in mitigation of sentence prior to its imposition.

Given the totality of the circumstances presented

in this case including, without limitation, the seriousness of the offenses, the harm to the victims, the danger to the community, the facts offered to the trial judge in mitigation of sentence, and the effectiveness of petitioner's attorney, nothing suggests that anything petitioner could have personally said would have produced a lesser sentence. Indeed, petitioner does not claim such would have been the case, nor does he offer anything in this habeas proceeding to indicate what he would have said to the trial court personally, if he had been allowed to speak in the first instance. The record fails to indicate petitioner was prejudiced, in any way, by his lack of opportunity to personally address the trial court. See In re Grayson, 242 Cal.App.2d 110, 51 Cal.Rptr. 145 (1966) (Failure to inquire pursuant to Pen. Code sec. 1200 as to imposition of sentence not fatal to judgment unless defendant deprived of counsel at sentencing).

B. State Sentencing

The second and third issues raised by petitioner, those concerning application of the state sentencing laws to his conviction, are more readily disposed of.

Generally, issues pertaining to a state court's interpretation of its sentencing laws do not raise a federal question cognizable in federal habeas proceedings. Howard v. Craven, 306 F.Supp. 730, 732 (C.D. Cal. 1969); Strum v. California Adult Authority, 395 F.2d 446, 448 (9th Cir. 1967); cert. denied 395 U.S. 947 (1969), reh'g. denied, 396 U.S. 870 (1969).

> "In a habeas corpus proceeding, a federal court will examine a state court's interpretation of its laws or Constitution only where it is clearly shown that such state judicial interpretations violate fundamental rights guaranteed by the Constitution of the United States. 28 U.S.C. section 2241(c).

Howard v. Craven, supra, at 732.

A careful review of petitioner's allegations reveal that he has not alleged any deprivation of a right protected by the United States Constitution. The petition, on its face, alleges only violation of California laws and the California Constitution. (Pet. pp. 2, 4, 7.)

This court has jurisdiction to entertain a petition for writ of habeas corpus only when a petitioner alleges his custody violates the Constitution, laws, or treaties of the United States. 28 U.S.C. section 2254(a); Engle v. Isaac, 456 U.S. 107, 119, 102 S.Ct. 1558, 1567, 71 L.Ed.2d 783 (1982); Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). Thus, federal habeas corpus relief under 28 U.S.C. section 2254 is not available for an alleged error arising from the interpretation or application of state law. Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985).

CONCLUSION

After careful review of the pleadings, the transcripts of record, together with the applicable case law, the court concludes petitioner is not entitled to a writ of habeas corpus.

IT IS THEREFORE RECOMMENDED that an Order be issued by the court (1) approving and adopting this Report and Recommendation as the findings of fact and conclusions of law herein and (2) directing the judgment be entered dismissing the petition with prejudice.

Dated: _____

_____
Ronald W. Rose
United States Magistrate

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED: December 22, 1989

GARY STEWART BOARDMAN,	Case No. SA CV 89-504 AHS
Petitioner,	(RWR)
v.	ORDER ADOPTING
WAYNE ESTELLE, WARDEN,	FINDINGS, CONCLU-
Respondent.	SIONS, AND RECOMMEN- DATIONS OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C. section 636(b)(1)(C), the Court has reviewed the petition, all the records and filed herein, and the attached Reports and Recommendations of the United States Magistrate. No objections to the Magistrate's Report and Recommendation have been filed herein. The court concurs with and adopts the findings and conclusions of the Magistrate.

IT IS ORDERED that Judgment be entered dismissing the petition with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of the Order, the Magistrate's Report and Recommendation and the Judgment herein by United States mail on petitioner and counsel for respondent.

Dated: _____

_____
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LODGED: November 21, 1989
FILED: December 22, 1989
ENTERED: December 29, 1989

GARY STEWART BOARDMAN,	)	Case No. SA CV 89-504 AHS (RWR)
Petitioner,	)	
v.	)	JUDGMENT
WAYNE ESTELLE, WARDEN,	)	
Respondent.	)	

Pursuant to the Order of the Court adopting the findings, conclusions, and recommendations of the United States Magistrate,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed with prejudice.

Dated: _____

_____
ALICEMARIE H. STOTLER
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED: May 13, 1992

GARY STEWART BOARDMAN,	No. 90-55238
Petitioner-Appellant,	D.C. No. CV-89-504 AHS
v.	
WAYNE ESTELLE, WARDEN,	ORDER
Respondent-Appellee.	

Before: TROTT, Circuit Judge.

The mandate in this case is ordered stayed for thirty days from the date of this order to allow respondent-appellee to file a Petition for Writ of Certiorari in the United States Supreme Court.

ORIGINAL

Supreme Court, U.S.
FILED
AUG 10 1992
OFFICE OF THE CLERK

NO. 91-2006

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

WAYNE ESTELLE, Warden, Petitioner,

v.

GARY STEWART BOARDMAN, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I.

WAS IT A PROPER EXERCISE OF DISCRETION FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT TO FIND, BASED UPON THE HISTORY OF THE CASE, THAT CALIFORNIA WAIVED ANY TEAGUE v. LANE DEFENSE?

II.

DOES A DEFENDANT HAVE A FEDERAL DUE PROCESS RIGHT OF ALLOCUTION UPON REQUEST PRIOR TO SENTENCING?

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1. The Ninth Circuit properly found, based upon the.....6 history of the case that, for whatever reason (tactical or otherwise), the Petitioner waived the right to raise a Teague defense.

2. The Ninth Circuit's exercise of discretion does.....11 not put it at odds with any other Circuit's decision.

3. The Ninth Circuit's decision in this matter will....14 not prevent California from raising in a timely fashion any applicable Teague defenses in future cases.

4. The Ninth Circuit, looking to tradition and.....16 practice properly found that a defendant's right to allocute on request prior to judgment and imposition of sentence is a fundamental right guaranteed by due process.

5. There is no reason for concern here for hybrid.....24 representation or for the federal constitutional decisions of the California Supreme Court.

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OPINION BELOW

The petition for a writ of certiorari erroneously indicates that the decision of the Ninth Circuit is published at 937 F.2d 1523. The opinion of the lower court is actually found at 957 F.2d 1523 (9th Cir. 1992).

STATEMENT OF THE CASE

Factual Statement

Respondent Boardman was sentenced to state prison for a twenty-four year term by the Superior Court of California after his guilty plea to eleven counts of offenses in violation of California Penal Code §§ 288 and 288a.

During the sentencing hearing, but prior to pronouncement of judgment and sentence, the court made the following observation:

> I also did receive a letter from Mr. Pearl (sic) [victim's father] that is part of the Probation Report.
>
> I don't know if you saw that, Mr. Ziff [defense counsel]. It was an illuminating letter that I read that shows the type of damage that he's done in matters of this nature. It creates ongoing problems for so many people. And, so, I guess I would say that without attempting to emphasize that the more (sic) than any other, that it was a letter that did have its effect upon me and it would be a letter that's expressed the problems created by what went on between the defendant and young Mr. Pearl.

[Dec. 12, 1983, RT 7-8][1]

During the sentencing hearing, Mr. Boardman, through his counsel, requested that he be permitted to allocute personally prior to the pronouncement of his sentence. The record shows Boardman's counsel advised the court, "Apparently, the defendant would like to address the court before I conclude." [Dec.13, 1983, RT 43; SER 7] This request was denied by the court, which noted that, "I'd just as soon not, if you don't mind. Any remarks should come from [defense counsel]. . . Just in general, I find it's better not to have the defendants to make comments." [Dec. 13, 1983, RT 43; SER 7]

In contrast, the parents of the victims made their presence known, and were allowed to voice their concerns to the court through the prosecutor and by written submissions forwarded to the court.[2]

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1 "RT" refers to the Reporter's Transcript of the sentencing hearing before the California Superior Court for Los Angeles County; "SER" refers to the Supplemental Excerpt of Record filed by the appellee before the United States Court of Appeals for the Ninth Circuit.

2 See generally the December 12, 1983, reporter's transcript which includes a recitation of the views conveyed to the court by the prosecution on behalf of the parents of the complaining witnesses.

Just prior to imposing sentence, the court stated:

> And I must balance the needs of protection of society against the needs and aid to you, Mr. Boardman.
>
> And I've listened to society. It's my duty to listen to society, to try to be aware of what society is telling the courts what they do at the ballots in the box, what they do with their letters to the editor, what they do when they come here in court and have some feel and be responsive to the attitude of society. (sic)

[Dec. 13, 1983, RT 68] (emphasis added)

At the conclusion of the hearing, and having refused to hear from Mr. Boardman, the court imposed a twenty-four (24) year period of incarceration. [SER 1, 4]

Procedural History

Through direct appeal, and then state and federal habeas petitions, Mr. Boardman continually pressed his claim that the sentencing court's denial of his request to be heard at the sentencing hearing constituted a denial of federal due process.

Boardman filed his petition for habeas corpus with the United States District Court on August 3, 1989. In reply

to the District Court's Order to Show Cause, California filed a response to the petition which asserted various legal bases why the petition should be denied. California did not assert a Teague defense in the District Court, even though all of the ensuing proceedings occurred after Teague v. Lane was decided by this Court.

Following denial of his petition by the District Court, Boardman appealed to the United States Court of Appeals for the Ninth Circuit. Once again, despite full briefing and oral argument, California did not assert a Teague defense.

After the Ninth Circuit published its decision on January 9, 1992, California asserted for the first time that Teague procedurally barred the relief that Boardman's petition sought for almost two and a half years. California raised this new claim in its petition for a rehearing filed January 22, 1992. Boardman was unable to respond to the petition for a rehearing since pursuant to Federal Rule of Appellate Procedure 40(a), the Ninth Circuit will not receive an answer to a petition for

rehearing unless requested by the court.[3]

On March 11, 1992, the Ninth Circuit issued a supplemental opinion in response to California's petition for rehearing. In that opinion, the Court of Appeals noted that it had the discretion to deem the defense waived where the state had failed timely to assert it. After conducting a thorough and complete balancing of the interests involved, the Ninth Circuit concluded that the state's conduct of the litigation and its failure to assert a Teague defense justified the Court's finding a waiver since "California inexplicably failed to raise the Teague defense both in the district court and on appeal." 957 F.2d at 1537 (emphasis in original) Accordingly, the Ninth Circuit exercised its discretion and found California to have waived any Teague defense.

Given the foregoing, Boardman never briefed this issue before the Ninth Circuit. This is the first time Boardman has had an opportunity to address this issue. By its actions, California seeks to convert this Court into a court of first instance for litigation of Teague claims.

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[3] Rule 40(a) of the Federal Rules of Appellate Procedure provides, in pertinent part, that "[n]o answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request." No such request was issued by the Ninth Circuit.

REASONS FOR DENYING THE WRIT

1. **The Ninth Circuit properly found, based upon the history of the case that, for whatever reason (tactical or otherwise), the Petitioner waived the right to raise a Teague defense.**

California suggests that review be granted to consider the refusal of the Ninth Circuit to address the merits of its assertion of a procedural defense based upon Teague v. Lane, 489 U.S.288 (1989). Yet, California did not advance this argument in the District Court, in briefing before the Ninth Circuit or even in oral argument. Indeed, this "defense" was raised for the first time (and then only as an ancillary issue) in California's Petition for Rehearing filed with the Ninth Circuit after the Court of Appeals had fully considered the case and published its decision.

The Ninth Circuit's refusal to consider California's Teague argument was a decision squarely within the proper bounds of its discretion, in accordance with the principles articulated in Granberry v. Greer, 481 U.S. 129 (1987), and first noted long before by this Court. Frisbie v. Collins, 342 U.S. 519 (1952) (cited in Granberry). Granberry properly calls for a court to take a "middle ground" as it exercises its discretion in construing a waiver by a state

from a failure to raise arguments and issues in a timely fashion.

Adopting this framework of analysis, in Granberry this Court rejected a stricter approach which would have either (a) absolutely precluded a party from raising the issue after the District Court proceedings, or (b) required that a court always consider the argument whenever raised, no matter at what stage or how late in the proceedings. The "middle ground" analysis requires a court to evaluate competing interests of comity, federalism and justice and thereby determine if the circumstances justify finding a waiver.

It was the Granberry "middle ground" analysis that was implemented by the Ninth Circuit here. This is evidenced by its explicit consideration of these same factors before declining to accept California's late argument. 957 F.2d at 1535-37. Clearly one consideration in the Ninth Circuit's analysis was the fact this argument had never been broached, much less developed either factually or legally, in over two years of litigation in the federal courts.

In part, in Teague this Court sought to avoid the generation of advisory opinions by precluding the

articulation of rules in cases where they would not be applied. 489 U.S. at 316. California's untimely efforts to assert Teague here pervert this underpinning of the doctrine by using it - inappropriately - to transform years of work by the federal courts into nothing more than an advisory opinion.

Apparently with the hope of obtaining a favorable result, California initially litigated this case on the merits. It did so subsequent to Teague and its progeny, of which California was surely aware. Only when it failed to obtain a favorable result did it turn to Teague in an effort to eviscerate an adverse ruling from the Ninth Circuit. California's invocation of Teague in its petition for reconsideration is no more than a transparent effort to "pull the trap door" from under the feet of the Court of Appeals and thereby nullify its decision.[4]

Quite properly, the Court of Appeals disabled the trap door by exercising its discretion to prevent this abuse of

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[4] If California's practice is endorsed, this Court will find itself, as it is here, the Court of first instance for the consideration of all issues as to whether "new rules" have been announced, whether retroactivity should be allowed or prohibited, etc. None of those concerns were ever addressed in this litigation, due to California's decision or failure to raise this issue until after the Ninth Circuit had issued its opinion.

the doctrine. Any other result would invite wasteful expenditure of the limited resources of the federal courts, which would find themselves addressing the arguments of habeas petitioners on their merits, only to face, after rendering a decision, the invocation of the Teague doctrine as a final effort to avoid an adverse result. For this reason the Ninth Circuit's decision is a proper exercise of its discretion and this matter does not merit a grant of certiorari by this Court.

As the Court of Appeals pointed out, "concerns of federalism and respect for a state's criminal judgments are marginal here because the state brought the problem on itself," 957 F.2d at 1537. The rule urged by California, requiring that waivers of Teague be express and not implied, would violate the very respect for state process which this Court has sought to engender. Under such a rule, if a state litigant fails to raise the issue, a prudent federal court would be obliged to inquire into counsel's strategic decisions in order to avoid the specter of a ex post facto nullification of its decision in the event that the state were later to choose to spring this "trap door."

In Teague, this Court gave the states a means to avoid endless collateral litigation of criminal matters. In

Collins v. Youngblood, 497 U.S. 37 (1990), this Court made it clear that Teague was a tool which could be used by a state when appropriate, but which was not "jurisdictional" in that it is not so fundamental that a court must raise the issue sua sponte. Consequently, whether or not to invoke Teague is a strategic decision properly vested in the state. Yet here California urges this Court go further and establish a rule that would require federal courts to second guess the strategy of the states when they chose not to utilize this tool. Surely, the federal courts should be entitled to rely upon the state to raise, in a timely fashion, those issues and arguments which serve its interests.

Appropriately utilized, Teague allows the federal courts to avoid extended consideration of the merits of habeas corpus petitions which seek relief under "new" rules. California seeks to accomplish exactly the opposite result - luring the federal courts into addressing the claim on its merits by withholding of the procedural defense,[5] and thereby encouraging the court to expend the

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[5] No evidence was ever presented to show whether the failure to argue Teague ab initio was caused by a strategic decision or some other reason. Nonetheless, competent counsel for the State of California, well versed in the law of habeas corpus, surely cannot suggest an unfamiliarity with so fundamental a decision in this area.

time and effort to consider fully the case, only to have the state seek to emasculate the decision by a last minute invocation of Teague. Moreover, Teague was never intended to provide a vehicle for states to disable the power of the federal court once exercised. The federal courts cannot afford to allow themselves to be manipulated in this fashion by disappointed litigants.

2. The Ninth Circuit's exercise of discretion does not put it at odds with any other Circuit's decision.

California advances an illusory conflict between the circuits as a basis for urging review by this Court. An examination of the authority cited in the petition shows that no such conflict exists. California suggests that three circuits refuse to infer a waiver of the Teague argument based upon a state's failure to raise it. The cases cited reveal no such rule of refusal to infer waiver.

First, in Smith v. Black, 904 F.2d 950 (5th Cir.1990), vacated, 112 S.Ct. 1463 (1992),[6] the court pointed out that courts had differed as to "the appropriateness of considering Teague limitations without the issue having been raised by the parties." 904 F.2d at 981 n. 12. The

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6 Smith was vacated by a per curiam order of this Court, making its citation suspect.

Fifth Circuit then proceeded to consider a Teague defense, but did so as an exercise of its discretion. Id. This, of course, harmonizes with the Ninth Circuit's actions here in that it recognizes that the courts have discretion as to the application of Teague.

California also cites Hanrahan v. Thieret, 933 F.2d 1328 (7th Cir. 1991), cert. denied, 112 S.Ct. 446 (1991). In this matter the Seventh Circuit endorsed its earlier decision "concluding that State had waived any argument based on Teague by failing to raise retroactivity objections when District Court asked for briefing. . ." 933 F.2d at 1337 n. 19.

Next, in Card v. Dugger, 911 F.2d 1494, 1523 n. 30 (11th Cir. 1990), the Eleventh Circuit did not consider the Teague issue because the state did not raise it. Likewise in Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) (en banc), cert. denied, 111 S.Ct. 1608 (1991), the Sixth Circuit simply found a waiver of Teague based upon the state's failure to raise the argument. 919 F.2d at 1104 n. 4. These cases all stand for the proposition, as implemented here, that a court has the discretion to find a waiver of Teague when a litigant chooses or fails timely to raise the issue.

Totally inapposite, and arguably mischaracterized in the petition, is Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir. 1989) (en banc). There the Tenth Circuit found that the failure to raise Teague did not result in a waiver of the issue because Teague was decided while that case was pending, and the court did not feel the state could have been expected to have anticipated the decision. 888 F.2d at 1288. Here, of course, Teague was decided years prior to California's belated invocation of the rule, and thus no similar element of surprise from the new doctrine can be discerned.[7]

In sum, California urges this Court to grant review simply because it has not prevailed below. As discussed, the Ninth Circuit's ruling embodies a proper exercise of its discretion. After full consideration of the interests of comity, federalism and fairness, that court elected not

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[7] In addition, Collins v. Youngblood, supra, was decided in June, 1990. Consequently California has long been on notice that the federal courts are not mandated to consider Teague issues in the absence of an argument by the parties. Of equal importance is the fact that California raises this asserted defense - late - with respect to the crux of all of the litigation that culminated in the Ninth Circuit's decision. Mr. Boardman has all along contended that a denial of due process was at stake by virtue of the refusal of the sentencing court to afford him the right of allocution. This is not a case where the decision turned on facts or a legal theory unforeseen by the litigants. This was the issue in the case.

to allow on a petition for rehearing the invocation of a doctrine designed not to create advisory opinions but rather to avoid them. California cites no case that supports its novel argument that the federal courts cannot rely upon the strategic decisions of advocates but rather must undertake an obligation to obtain express waivers of all available arguments.[8] Review is uncalled for here as the Ninth Circuit acted well within the discretion which this Court, and all others, have agreed is appropriate.

3. **The Ninth Circuit's decision in this matter will not prevent California from raising in a timely fashion any applicable Teague defenses in future cases.**

The Ninth Circuit's determination that California waived its right to assert a Teague defense in this matter is a fact specific determination that will not in any way impede California's assertion of such defenses in future cases. The Ninth Circuit's supplemental opinion makes clear that California "brought this problem on itself"

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[8] California also urges this Court to view the argument as preserved so long as it opposed the grounds raised in the petition generally. In so arguing, California fails to state why courts should have to construe so broadly its position, or any possible justification why the courts should not require the state simply to articulate this defense. Indeed, such an approach would deprive the courts of an early focus on a dispositive defense, one which if valid could well save the courts and the litigants the unnecessary expenditure of funds occasioned by further litigation.

by the manner in which it handled the litigation. 957 F.2d at 1537.

If this Court presumes, as surely it is entitled to do, that California will litigate future cases with the orders and decision of this Honorable Court in mind, then the federal courts will be less likely to see California again engage in tactics such as those used here. Such an outcome will promote respect for and ready utilization of this Court's decisions by California, as well as result in judicial economy for the federal courts in which California litigates.

Further, such a course will ensure this Court is not called upon repeatedly to act as a court of first instance for the litigation of issues such as the factual question of why the defense was not raised earlier below. It will further have the salutary effect of encouraging litigants to litigate fully all issues in a uniform and timely fashion. This will also ensure that the lower courts perform their proper function of providing a forum for resolution of factual matters and narrowing of the issues without need for involving this Court in such matters.

* * * * *

4. The Ninth Circuit, looking to tradition and practice, properly found that a defendant's right to allocute on request prior to judgment and imposition of sentence is a fundamental right guaranteed by due process.

This Honorable Court decades ago aptly observed: "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Green v. United States, 365 U.S. 301, 304 (1961). The Ninth Circuit's decision is true to this proposition, and breathes life into its principle. In doing so, contrary to California's assertion, it does not create conflict with other circuits' decisions.

The precedential value of the decision here is expressly limited to "circumstances in which a defendant, either unrepresented or represented by counsel, makes a request that he be permitted to speak to the trial court before sentencing." 957 F.2d at 1530. In this regard, the Ninth Circuit's decision is fully consistent with the principle articulated in Green as well as with the decisions of all other Circuit Courts of Appeal. This is a fundamental reason that certiorari should not be granted: there is no conflict within the circuits on the right to allocute when a defendant so requests.

The decision, with its narrow holding, does not create a conflict with any cases of any circuit. Rather, as the decision correctly observes, the allegedly conflicting

decisions from other circuits are readily distinguishable on their facts. This merits discussion.

The logical starting point for such a review is the only reported case with similar facts: Ashe v. North Carolina, 586 F.2d 334 (4th Cir. 1978). Like Mr. Boardman, the Ashes were affirmatively denied an opportunity to address the sentencing court before their sentences were imposed. They, too, petitioned for a writ of habeas corpus, seeking relief from what they construed was an unlawfully imposed sentence. In granting the writ and remanding for resentencing, the Fourth Circuit found that affirmatively silencing a defendant who wishes to be heard prior to sentencing is a violation of due process. 586 F.2d at 336 ("Petitioners contend that refusal of a defendant's request to speak to the sentencing court constitutes denial of due process under the fourteenth amendment and we agree.")[9]

Accordingly, both Ashe and Boardman, the only two decided cases where a defendant was affirmatively denied allocution, have resulted in the same constitutional

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9 It bears observation that the court recognized that limits can be placed upon a defendant's right of allocution. "This is not to say that a defendant's right to address the sentencing court is unlimited. The exercise of his right may be limited both as to duration and as to content." Ashe v. North Carolina, 586 F.2d at 336-37.

conclusion: such a denial is a violation of due process. There is no conflict between the circuits on this point.

The cases that did not find allocution to be a constitutionally based right are readily distinguishable. In none was a defendant affirmatively refused the right to allocute by the sentencing court. "All of the cases denying Constitutional status to allocution are factually distinguishable because they do not involve the denial of an affirmative request to speak." Boardman, 957 F.2d at 1529 (emphasis in original).

The most common scenario presented in the divers reported cases occurs when the sentencing court fails to inquire as to whether the defendant wishes to be heard.[10] Thus, these decisions address a different question: Does a defendant have a constitutional right to be invited to allocute prior to imposition of sentence? The clear, unanimous answer to this question has been in the negative.

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10 In the federal context this has repeatedly been held to be a violation of Rule 32 of the Federal Rules of Criminal Procedure which requires resentencing. United States v. Miller, 849 F.2d 896, 897 (4th Cir. 1988); United States v. Prince, 868 F.2d 1379, 1386 (5th Cir. 1989); United States v. Turner, 741 F.2d 696, 698-99 (5th Cir. 1984); United States v. Walker, 896 F.2d 295, 301 (8th Cir. 1990). These decisions were not premised upon any constitutional right, but rather upon the provisions of Rule 32.

California uses this different answer (to this different question) as the basis for the perceived "conflict" it finds between the decision below in this matter and the other reported cases. As shown in the Ninth Circuit's decision, impartial analysis reveals no legal conflict exists.[11]

Boardman and Ashe are the only two instances in which sentencing courts affirmatively denied defendants the right to be heard. The paucity of such cases is not surprising when considered against the statutory framework and caselaw that exists in most jurisdictions directing courts to permit defendants to allocute prior to sentencing. Indeed, even the instant litigation would not have occurred if the trial judge had complied with California's own

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[11] Although Judge Trott begins his discussion by observing that his sister circuits have reached conflicting decisions on the question of allocution, he thereafter demonstrates that in fact no conflict exists. While the following cases discuss the issue, they do so in dicta since each was controlled by the terms of Rule 32. United States v. Moree, 928 F.2d 654, 656 (5th Cir. 1991), and United States v. Jackson, 923 F.2d 1494, 1496 (11th Cir. 1991). Cf. United States v. Coffey, 871 F.2d 39, 40 (6th Cir. 1989), and United States v. Fleming, 849 F.2d 568, 569 (11th Cir. 1988). However, none of these courts was actually called upon to decide the constitutional dimensions of a court affirmatively silencing a defendant who wished to allocute. For this reason, the doctrine of judicial restraint in constitutional matters dictates that their opinions on the subject amount to nothing more than dicta.

procedures.[12]

This illustrates an equally compelling reason why this matter does not merit the grant of a writ of certiorari. Such a fact pattern simply is not likely to occur often. Most jurisdictions already have statutes similar to the

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[12] While California case law does not require a defendant personally be afforded allocution, California Penal Code § 1200 clearly notes, in pertinent part, that "When the defendant appears for judgment he must be . . . asked whether he has any legal cause to show why judgment should not be pronounced against him." This fits squarely within the definition of allocution given by Black's Dictionary: "Formality of court's inquiry of prisoner as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction." Black's Law Dictionary 70 (5th ed. 1979).

federal rule.[13] Hence, the fact pattern presented here is

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A partial survey of the states and the District of Columbia reveals the following. These jurisdictions are among those that follow the federal model embodied in Rule 32 of the Federal Rules of Criminal Procedure: **Alaska**, 1991 Alaska Rules of Court, Rule 32(a); **District of Columbia**, D.C.Code Ann. §23-103 (1981); **Idaho**, Idaho Code, Criminal Rules, Rule 33 (1991); **Kansas**, Kan.Stat.Ann. §22-3424 (1991); **Maine**, Rule 32(a)(2) of Rules of Court (1991)(with exception for certain lesser categories of offenses); **Maryland**, Md.Code Ann. §4-343((d) (applicable in capital cases); **Massachusetts**, Mass.Ann.Laws Rule 28(b) (Law.Co-op 1979); **Minnesota**, Minn. Rules of Court, Rule 27.03 Subd.3 (1992); **Nevada**, Nev.Rev.Stat.Ann. §176.015(2)(b) (Michie 1991); **New Jersey**, N.J.Rules Governing the Courts, R.3:21-4(b)(1991); **South Dakota**, S.D. Codified Laws §23A-27-1 (1988); **Vermont**, Vt.Stat.Ann. Rules of Crim.Pro.Rule 32(a)(1)(1983); **West Virginia**, W.Va.Code, State Rules, R.32(C) (1992); **Wyoming**, Wyo. Court Rules, R.33(a)(1)(1979).

These are among the states which have clearly recognized the right of allocution, either by statute or by caselaw: **Arizona**, 17 A.R.S. Rules of Crim.Pro. 26.10(b)(1); **Arkansas**, Ark.Stat.Ann. §§43-2301, 43-2303, 43-2813 (Supp.1973), and Tate v. Smith, 524 S.W.2d 624, 627 (1975); **Colorado**, Noland v. People, 485 P.2d 112, Coleman v. People, 482 P.2d 378; **Indiana**, Ind.Code Ann. §35-4.1-4-5 (Burns 1979 Repl.) and Minton v. State, 400 N.E.2d 1177 (1980) (applies only after conviction at trial); **Iowa**, Rule 22(3)(d) and State v. Jorden, 461 N.W.2d 356, 359 (1990); **Missouri**, Mo.Rev.Stat. §546.570 (1959) (as modified by §546.580) (applicable after conviction at trial by jury), and State v. Ashworth, 143 S.W.2d 279; State v. Kitchin, 300 S.W.2d 420, 425, cert. denied, Kitchin v. State of Missouri, 354 U.S. 914; **Montana**, Mont.Code Ann. §46-18-115(3)(1991); **Nebraska**, Neb.Rev.Stat. §29-2201 (1989); **New York**, N.Y.Crim.Pro.Law §380.50 (McKinney 1983); **North Carolina**, N.C.Gen.Stat. §15A-1334(b)(1991); **Ohio**, Ohio Rev.Code Ann. §2947.05 (Anderson 1987), and State v. Baker, 117 N.E.2d 348, 352 (1960); **Pennsylvania**, 42 Pa.Con.Stat.Ann. §1405 (Purdon 1989); **Rhode Island**, Leonardo v. State, 444 A.2d 876, 878 (1982), Robalewski v. Superior Court, 197 A.2d 751, 753 (1964), State v. Nicoletti, 471 A.2d 613 (1984); **Tennessee**, Tenn.Code Ann. §40-35-210(6) (1990); **Texas**, Tex.Code Crim.Proc.Ann. art. 42-07 (Vernon 1979); **Utah**, State v. Lorrah, 761 P.2d 1388 (1988); **Virginia**, Va.Code Ann. §19.2-298 (1950), and Bassett v. Commonwealth, 284 S.E.2d 844 (Supreme Court of Virgina, 1981); **Wisconsin**, Wis.Stat.Ann. §972.14 (West 1985).

Certain states have found it sufficient for the defendant's counsel to address the court: **Alabama**, Irwin v.

not likely to reoccur. Rather, since those courts in jurisdictions with such statutory requirements will generally follow their own law, the probability is that the problem presented here will at most occur only sporadically. For this reason, this issue does not merit the grant of a writ of certiorari.

California disingenuously argues that "in light of numerous modern procedural protections" defendants are adequately protected in other ways. (Petition for Writ of Certiorari at 16.) California offers no authority for this proposition. Rather, it simply observes that a lawyer can protect a defendant's "legitimate interests." It appears California means, but will not come right out and say, that a defendant's interest in speaking at his sentencing hearing is an illegitimate interest that should be discouraged. In fact, personal allocution serves many positive functions. It ensures that the sentencing court is fully informed prior to passing judgment, it is a step toward rehabilitation by affording a public opportunity for the defendant to express remorse, and it helps the healing process for the victims in those instances where apologies are tendered by the offender for his conduct.

State, 203 So.2d 283, 285 (1967); **Hawaii**, Haw.Rev.Stat. §§706-601(2), 706-602, 706-604(1), and State v. Medeiros, 791 P.2d 730 (1990); **Michigan**, People v. Gulley, 17 Mich.App. 646; **North Carolina**, State v. Martin, 280 S.E.2d 775, 780 (1981).

In arguing the contrary, California completely ignores a fact recognized by all who witness criminal sentencings: the silence that falls across a courtroom when a defendant speaks. The court may ultimately react in any number of ways to whatever the defendant says, but the operative point is that the defendant who seeks to be heard will have been afforded the opportunity. When the Ninth Circuit recognized the legitimacy of this right it did not stray afield from any of this Court's decisions, but rather it marched straight forward within the guideposts of due process.

The true procedural revolution underway in criminal sentencing is in the arena of victims' rights legislation. California itself is among the states that have enacted such legislation.[14] A principal goal of victims' rights legislation is to guarantee victims the right to be heard

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[14] California Penal Code § 679 ("Rights of Victims and Witnesses of Crime") and § 1191.1 contain the operative provisions. In particular, § 1191.1 states, in pertinent part, "The victim, or his or her parent or guardian if the victim is a minor, or next of kin has the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his or her views concerning the crime, the person responsible, and the need for restitution. The court in imposing sentence shall consider the statements of victims, parents, or guardians, and next of kin made pursuant to this section. . . (emphasis added).

at a defendant's sentencing.[15] While the sentencing court would not hear from Mr. Boardman, it succinctly stated that it had heard the community's concerns and had them in mind in determining his sentence. Considered against a national backdrop where thirty-two (32) states have such victims' rights legislation, the defendant's interests in allocution are all the more pronounced. California asks this Court to permit a sentencing structure where the sole interested party not guaranteed the right to be heard is the defendant whose fate and liberty hang in the balance.

5. There is no reason for concern here for hybrid representation or for the federal constitutional decisions of the California Supreme Court.

California proffers two final reasons it believes this Court should grant certiorari: (1) concern for the possibility of creating "hybrid representation" and (2) the authority of the California Supreme Court. Each of these should be dispatched by this Court summarily.

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15 A recent Wall Street Journal article notes that the National Conference of Commissioners on Uniform State Laws, a Chicago group that drafts legislation for nation-wide use, has just approved a victims rights act. One of the provisions of the act is allocution for victims both before sentencing courts and parole boards. The article notes that "[t]hirty-two states allow such oral statements, which victims-rights groups say are therapeutic and empowering, particularly for domestic-violence and child-abuse victims." Wall Street Journal, August 7, 1992, at B1, col. 5.

Hybrid representation will not result from guaranteeing a defendant the right personally to address a sentencing court prior to the imposition of sentence. Were it otherwise, surely such a result would have been observed in the federal trial courts of this country years ago following the implementation of Rule 32 of the Federal Rules of Criminal Procedure. The right of allocution is analogous to a defendant's right to testify, regardless of whether he is represented by counsel. Permitting a defendant to address a court, usually for a matter of moments or minutes, does not detract from sentencing proceedings; rather it enhances the integrity of the proceedings by ensuring that the sentencing court is fully advised by all concerned before it issues its order.[16]

Finally, while the California Supreme Court undoubtedly does enjoy respect for its jurisprudence, its decisions on federal due process simply are not binding on

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16 In support of its view that the Ninth Circuit has contravened this Court's prior decisions, California notes this Court's prohibition on "hybrid representation" contained in McKaskle v. Wiggins, 465 U.S. 168 (1984). Yet the facts of McKaskle take us to heretofore unseen limits. The standby counsel appointed in that matter to assist the defendant were continuously accepted and then rejected anew by the defendant over the course of a three day trial. A quick review of the facts set forth in Justice O'Connor's opinion demonstrates the uniqueness of the situation. 465 U.S. at 170-72.

this Honorable Court or on the lower federal courts. Accordingly, its decision regarding allocution does not and should not determine the issue for this Honorable Court.

CONCLUSION

For the foregoing reasons, this matter does not present issues that merit decision by this Honorable Court. It is respectfully urged that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

DATED: August 10, 1992

PHILLIP A. TREVIÑO